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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

SUPPLEMENTAL REPORT OF WALTER P. ARMSTRONG, JR., SPECIAL MASTER

August 27, 1979

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SUPPLEMENTAL REPORT OF WALTER P. ARMSTRONG, JR., SPECIAL MASTER

PREFATORY

In the order approving the original report of the Special Master (420 U.S. 529) the Court provided as follows:

> "The parties are directed to prepare and file a decree, for entry by this Court, establishing 'a base from which the extent of the territorial waters under the jurisdiction of the State of Louisiana pursuant to the Submerged Lands Act can be measured'. Report of the Special Master 53. If the parties cannot agree upon the form of the decree, then they shall refer any remaining disputes to the Special Master for his recommendations. In the event of such a referral, the Special Master is authorized to hold such hearings, take such evidence, and conduct such proceedings as he may deem appropriate and in due course, to report his recommendations to this Court."

Such a decree was prepared and entered (422 U.S. 13) without the necessity for intervention by the Special

Master. This decree also provided for the rendering and filing with the Court of certain accountings as therein provided. These accountings and objections thereto[1] were duly made and filed, whereupon the Court referred them to the Special Master (423 U.S. 909). It is upon this reference that the present supplemental report is made.

Following the reference to the Special Master on October 20, 1975, the parties attempted to reconcile the differences which existed between them, primarily through correspondence and a conference between their respective technical staffs held on February 26 and 27, 1976. On May 4, 1976 a pre-trial conference was held at Memphis, Tennessee, the results of which were embodied in a pre-trial order entered May 26, 1976, which recites the agreements reached by the parties and states the unresolved issues as follows:

"(1) Whether the United States is obligated to account either for the value of the use of the State's share of the escrowed[2] funds or for interest on the funds.

1.

(a) Louisiana Unimpounded Fund Accounting, filed August 15, 1975;

(b) Louisiana Impounded Fund Accounting, filed September 15, 1975;

(c) United States Unimpounded Fund Accounting, filed August 25, 1975;

(d) United States Impounded Fund Accounting, filed September 15, 1975;

(e) United States Objections to Louisiana Unimpounded Fund Accounting, filed October 15, 1975;

(f) Louisiana Objections to United States Unimpounded and Impounded Fund Accounting, filed October 22, 1975. (Although filed two days after the order of reference these are taken as included therein.)

2. Although the term "escrowed" is used in the order, which was approved by counsel as to form, the reference is obviously to funds "impounded" under the Interim Agreement of October 12, 1956.

(2) Whether Louisiana has the obligation to account for severance taxes in its unimpounded fund accountings.

(3) Whether Louisiana has the obligation to account for revenues received from the area formerly constituting Zone 1 established by the interim agreement of October 12, 1956."

Thereafter on June 6, 1976 a stipulation was entered into between the parties pursuant to which supplemental and amended accountings and objections thereto[3] were filed by each of the parties.

On July 25, 1977 a further Pre-Trial Conference was held in Memphis, Tennessee, as a result of which a Supplemental Pre-Trial Order was entered on August 12, 1977, pursuant to which evidentiary hearings on the unresolved issues were held at Memphis, Tennessee on November 14, 15, and 16, 1977 and on March 28, 1978. Thereafter

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3.

(a) United States Supplemental Impounded Fund Accounting filed June 23, 1976

(b) United States Corrected Unimpounded Fund Accounting filed May 23, 1976

(c) Louisiana Objections to United States Supplemental Impounded Fund Accounting filed July 21, 1976

(d) Louisiana Objections to United States Corrected Unimpounded Fund Accounting filed July 22, 1976

(e) United States Split Lease Accounting filed August 23, 1976

(f) Louisiana Split Lease Accounting filed August 23, 1976

(g) Louisiana Objections to United States Split Lease Accounting filed October 21, 1976

(h) United States Objections to Louisiana Split Lease Accounting filed October 26, 1976

(i) Amended Split Lease Accounting Exhibits filed by both parties February 17-18, 1977

(j) Stipulation as to Split Lease Accountings filed July 25, 1977 resolving all technical objections

the matter was thoroughly briefed and oral argument presented before the Special Master in New Orleans on February 20, 1979. It is upon the basis of this evidence and the arguments based upon it that the following findings and recommendations are made.

First Issue

Is the United States obligated to account for and pay to the State of Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds?

On October 12, 1956, the parties entered into an Interim Agreement under which the submerged lands lying offshore of the southern boundary of the State of Louisiana were divided into four zones as therein described, that contiguous to the coastline being designated as Zone 1, the next most seaward as Zone 2, the next as Zone 3, and the most seaward as Zone 4. Under this agreement the United States agreed (with certain exclusions not here material) "to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties or other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3, being the disputed area," at such time as said leases became subject to the agreement as therein provided.

The Interim Agreement further provides that "the impounded funds provided for herein shall be held intact, in a separate account for each lease or portion thereof affected, by each party until title to the area affected is determined. Whereupon, except as otherwise herein provided: - - -

(b) Any funds derived from an area finally determined to be owned by the State of Louisiana" (with an

exception not here material) "shall be taken from the separate and impounded fund in the Treasury of the United States" and paid to the appropriate officer of the State of Louisiana.

The ownership of lands in the disputed area (Zones 2 and 3) has now been settled by decree of the Court (422 U.S. 13), accountings have been filed by each of the parties, and payment made from the impounded funds of the principal amounts due each of them pursuant to the accountings filed as reflected in footnote 3 and to previous accountings filed in these proceedings. The sole unresolved issue as to such payments is whether the State of Louisiana is entitled, as it claims, to interest upon the amount due it upon that portion of the impounded funds paid to it or, in lieu thereof, to payment for the use of those funds while they were held in the Treasury of the United States. As this issue is raised by the State's objection to the accounting of the United States for those funds, the burden is upon the State to establish its right to such payment if it is to prevail upon this issue.

Indisputably the Interim Agreement does not specifically provide for the payment of interest upon any part of the funds impounded pursuant to it. The funds are to be impounded in a separate fund in the Treasury of the United States and, upon the determination of the ownership of the lands in the disputed area, taken from the separate and impounded fund in the Treasury of the United States and paid to the parties respectively entitled to them. The State of Louisiana argues, however, that the term "impounded" necessarily implies an obligation on the part of the holder of the funds to pay interest thereon. With this we cannot agree.

Strangely enough, there seems to be no generally accepted definition of the term "impound" as applied to

funds. Aside from its general application to the containment of cattle or water, standard dictionaries define it as "to seize and retain in legal custody." Black's and Bouvier's law dictionaries adopt a similar definition, as does Kohler's "A Dictionary for Accountants." Nowhere is there any reference to any obligation on the part of the holder other than to hold the property and deliver it intact.

The State of Louisiana insists, however, that the term "impounded in a separate fund" is equivalent to "hold in escrow". In support of this position it cites Act 38 of the 1956 Louisiana Legislature (the authority under which Louisiana became a party to the Interim Agreement) which authorizes designated agents of the State to "negotiate and enter into agreements or stipulations for and on behalf of the State with the United States respecting the deposit in escrow or impounding" of sums derived from oil leases in the disputed area. In this statute, it argues, the terms "deposit in escrow" and "impounding" are used synonymously. The language, however, is equally subject to the interpretation that they are alternatives.

The State also relies upon certain language in Exhibit C to the Interim Agreement (headed "Draft of Agreement Between State of Louisiana and Operators or Lessees in Disputed Area") where reference is made to "an impounded or escrowed fund." Here, too, the language would appear to be alternative rather than merely repetitious.

There is, therefore, at least an ambiguity as to the meaning of the term "impounded" as used in the Interim Agreement. Under these circumstances, it is proper to look to the intent and understanding of the parties at the time the agreement was entered into in order to determine the meaning of the term as used therein.

It is apparent that during the negotiations which led up to the Interim Agreement, representatives of both parties used the term "escrow" rather freely and loosely. This makes it all the more significant that in the instrument finally executed that term nowhere appears. At a meeting of the negotiators on July 2-3, 1956, the State's representatives proposed an arrangement under which funds derived from oil leases in the disputed area would be held by a third party. This the United States rejected out of hand, insisting that those funds should be held by it during the interim period, as was finally agreed. If the funds were to be handled identically in either case, there would seem to be little point in this insistence. Actually under Sec. 7 of the Outer Continental Shelf Lands Act (43 U.S.C. 1336), the negotiators for the United States, unlike those for Louisiana, had no specific authority to enter into a third party escrow agreement, but only agreements respecting "payment and impounding of rents, royalties, and other sums" derived from mineral leases on disputed areas.

The only purpose of the State in arguing that the Interim Agreement in fact provided for an escrow arrangement is to support its contention that such an arrangement is a fiduciary relationship and creates a trust, and that there is an obligation upon a trustee holding such funds to invest them in income producing property, and that if he does not do so he is liable for interest thereon. This proposition is at least dubious, as ordinarily the very purpose of a trust is to produce income, while that of an escrow account is merely to assure delivery of the escrowed property intact. But admitting *arguendo* that in the absence of a contrary understanding there is such an obligation upon an escrow holder, the evidence in this case clearly negatives any such understanding upon the part

of the parties to the Interim Agreement. The single negotiator for the United States who testified stated that the question of interest was never discussed (Swarth Dep. pp. 7-8). This was confirmed by the negotiators for Louisiana who testified, two of whom very candidly stated that the reason was that they knew that the United States would not enter into the agreement if a provision for the payment of interest was incorporated in it (Tr. pp. 70, 95, 98, 99, 102, 103, 163). Under these circumstances, the deliberate omission of a provision for the payment of interest from the Interim Agreement amounts to an understanding that it would not be paid.

In any event, the United States could not pay interest upon funds held by it without statutory authority, a fact which the negotiators would be presumed to know. The State seeks to find such authority in 31 U.S.C. 547(a), which provides that "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum." It would be stretching the meaning and intent of this statute beyond permissible limits to say that it applies to the present situation. The funds here involved are not "funds held in trust by the United States" within the meaning of this statute, nor does the statute authorize the payment of interest.

Louisiana also argues that the authority granted under Sec. 7 of the Outer Continental Shelf Lands Act to "impound" funds carries with it the authority to agree to pay interest upon such impounded funds, and cites the negotiations leading up to an agreement between the State of California and the United States in support of this position. Even if this is correct, it necessarily follows that there is no authority under this act to pay interest in the absence

of such an agreement, and Louisiana's knowledge of the California negotiations establishes that it was well aware of this fact.

Further evidence of such awareness is evidenced by the resolution adopted by the Louisiana legislature on June 6, 1967 (Concurrent Resolution No. 251) which contains the following provisions:

> ". . . WHEREAS, the said revenues and royalties have for a number of years been impounded by the Federal Government and are presently being held in an 'escrow' fund, and
>
> "WHEREAS, the Federal Government has not invested the said revenues and royalties and has refused to invest the said funds even though the state of Louisiana has made official request that the funds be invested, and
>
> * * *
>
> "Be it Further Resolved that the Legislature of Louisiana does here' y respectfully request and urge the above named officials to take such steps as are necessary to effect a prudent and effective investment of the funds now and hereafter so impounded, with a view to increasing the increment deriving both to the Federal Government and to the State of Louisiana."

It will be noted that the language of this resolution is precatory and not demanding. In fact, the State of Louisiana apparently never took the position that it was entitled as a matter of right to interest upon or payment for the use of its share of the impounded funds until it filed its objections to the accounting of the United States for those funds.

Mr. John Carlock of the Treasury Department replied to the resolution on behalf of the United States in a letter directed to the Governor of the State of Louisiana dated July 14, 1967, in which he said:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of a statutory authority."

Apparently at the time the State of Louisiana accepted this explanation, as it made no protest. However, it now takes the position that the United States did have statutory authority to agree to invest impounded funds under Section 7 of the Outer Continental Shelf Lands Act (43 U.S.C. 1336) as interpreted in the California situation. However, it is clear that the United States never entered into any such agreement, nor was it requested to do so; and in the absence of such agreement, it had no obligation to invest the impounded funds held by it. There is therefore no factual basis for holding it liable for the payment of interest upon that portion of the impounded funds held by it and now adjudged to belong to the State of Louisiana.

But aside from the question of interest, the State of Louisiana claims that the United States had access to and therefore the use of, and in fact did use, the impounded funds, including that part ultimately adjudged to belong to the State, during the period of impoundment, and therefore should be liable to the State for the value of the use of those funds, on the theory of unjust enrichment, constructive trust, restitution, or quasi-contract. All of these are equitable remedies, and there is therefore some doubt as to whether they would apply as against the sovereign. However, even assuming that they would, they are inappropriate to the factual situation here presented.

There is no dispute as to what was actually done with funds received by the United States resulting from mineral leases in the disputed area. This is perhaps best stated in the United States Response to Louisiana's First Request for Admissions filed December 13, 1976:

> "The United States admits that the cash representing revenues from disputed lands, received by the United States pursuant to the Interim Agreement of October 12, 1956 (1) was deposited in the Federal Reserve Bank, New Orleans, a number of other banks designated as Federal depositories for the United States Treasury, and the office of the United States Treasury, Washington, D.C. and (2) became part of the general account of the Treasury of the United States."
>
> "The United States admits that the actual cash representing revenues from disputed lands, then deposited in the general account of the Treasury of the United States, was immediately available to meet any authorized cash needs of the Government whatsoever."
>
> "The United States admits that the actual cash deposited in the general account of the Treasury of the United States, including cash representing revenues from disputed lands, is subject to disbursement by checks drawn on the United States Treasury by Government disbursing officers in order to make payment of Government obligations as authorized by law."

It does not follow, however, that the United States breached the terms of the Interim Agreement. That agreement provides that (with exclusions not here material) "the United States agrees to *impound in a separate fund in the Treasury of the United States a sum equal to* all bonuses, rentals, royalties and other payments" derived

from leases in the disputed area (Emphasis supplied). There is no requirement that the identity of the actual payments received be maintained; the agreement requires only the maintenance of a fund equal to those payments. And this fund is to remain in the custody of the Treasury of the United States, as was in fact done. The State's position rests entirely therefore on the phrase "impounded in a special fund," which the State claims that the United States did not do, but on the contrary used the funds for its own purpose, the value of which use the State now claims that it is entitled to recover.

The United States, on the other hand, insists that it did all that was required of it under the agreement. This consisted, as the undisputed proof shows, of establishing in August, 1956, a special deposit fund account (14X6709) on the books of the Treasury, which was periodically audited and reports thereof made to the State of Louisiana. Although this account was established in accordance with accepted government procedures prior to the execution of the Interim Agreement, this appears to be immaterial if it in fact conformed to the requirements of that agreement.

An "account", according to Kohler's "A Dictionary for Accountants", is "A formal record of a particular type of transaction expressed in money or other unit of measurement and kept in a ledger." A "fund", according to this same authority, is, in government accounting, "A self-balancing group of accounts—asset, liability, revenue, and expense—relating to specific sources and uses of capital and revenue." The special deposit fund account (14X6709) appears to come within these definitions. The amount of money on deposit with the Treasury was at all times adequate to pay in full any award to Louisiana out of the impounded fund up to the full amount of that fund. Nor did the United States have the unrestricted use of this

fund, for the full amount of it was always carried as a potential liability to the State of Louisiana on the deposit fund liability account (14X6709), and no part of it was therefore ever available to the United States for appropriation for purposes other than disbursement under the Interim Agreement pursuant to the "applicable determination" of the Court. Nor is Louisiana's "velocity of turnover" evidence material upon this issue; there is no requirement under the Interim Agreement that the United States retain the actual revenues paid to it resulting from mineral leases in the disputed area, but only "a sum equal to" the amount of those revenues. This it did.

The proof shows that the funds impounded under the Interim Agreement were handled in exactly the same way as similar funds had been handled in the past, and that representatives of Louisiana were fully aware of this fact. They knew of the manner that similar funds derived from mineral leases off the California coast had been handled. They knew of the way in which the impounded funds in which they had an interest were being handled as they received periodic reports. They made no objection, and when they made a request that the method of handling the funds be altered and that request was denied, they made no protest. It can only be assumed that they accepted this method of handling those funds as proper under the Interim Agreement. And they made no request for modification of the agreement in this respect.

Louisiana also makes the argument that the United States had an obligation to account for any profits which it realized from the use of the impounded funds as a joint venture. Suffice to say on this point that the proof does not show any profits so derived which require such an accounting, nor does the relationship between the State and the United States have any of the characteristics of a joint venture.

From all of the above it appears that the United States has fulfilled its obligations under the Interim Agreement and under the Supplemental Decree of June 16, 1975 by filing the accountings heretofore made pursuant thereto and paying to the State of Louisiana the amounts called for thereby, and it has no further obligation under that agreement or that decree, either by way of interest or payment for the use of Louisiana's money. It recognized income from leases within the disputed area as its source of revenue. It acknowledged such payments to the State of Louisiana as the Court might decree as a liability. This seems to be all that was required by the language of the Interim Agreement.

This agreement, however, also requires that this fund be maintained "intact". Obviously this does not mean that the actual dollars received from oil leases in the disputed area should retain their identity, else why specify "a sum equal to" the amount of those dollars; it means that the fund itself should be held intact, in that no liabilities should be charged against it except as provided in the Interim Agreement. The applicable provision of the agreement is as follows:

> "Payment of impounded funds hereunder shall be made in full within seventy-five (75) days after the date of the applicable determination, unless by agreement of the parties a later date is specified."

The "applicable determination" is the Court's decree of June 16, 1975 (422 U.S. 13) and payment has now been made out of the impounded fund in accordance therewith and with the Interim Agreement. At no time was the ability of the United States to perform its obligations under the Interim Agreement impaired. No other liabilities have ever been charged against the special deposit fund account (14X6709) and no other payments made out

of the fund for which it accounts. No provision for such payment is contained in the Interim Agreement, nor is such payment ordered by the Supplemental Decree (422 U.S. 13). Nor is there any Act of Congress authorizing any such payment. Therefore the United States has no further obligations beyond those it has performed.

Second Issue

Does Louisiana have the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1?[4]

This issue is raised by objection by the United States to Louisiana's accounting for unimpounded funds filed pursuant to Par. 6(a) of the Decree of June 16, 1975 (422 U.S. 13). The burden of persuasion is therefore upon the United States. The position of the United States is that certain areas lying within Zone 1 having now been adjudicated to belong to the United States, the State of Louisiana is now obligated to account for and pay over to the United States all revenues realized by the State from mineral leases upon any part of those areas from June 3, 1950 (the date fixed for accounting by Decree of December 11, 1950 [340 U.S. 899]).

This would certainly be the case in the absence of any adjudication or agreement between the parties to the contrary. The State of Louisiana insists, however, that by the Interim Agreement of October 12, 1956 the United States waived any claim to revenues derived from mineral leases upon areas ultimately adjudicated as belonging to it and lying within Zone 1, and that any such waiver contained in that agreement was specifically validated by

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4. While this is the third issue listed in the Pre-Trial Order of May 26, 1976, in the interest of orderly procedure it will be dealt with here as the second issue.

Par. 13 of the Decree of June 16, 1975 (422 U.S. 13). It is with this argument that we must concern ourselves.

The Interim Agreement cites as authority for the United States' participation therein Section 7 of the Outer Continental Shelf Lands Act (43 U.S.C. 1336), which provides in part that the United States acting through the Secretary of the Interior with the concurrence of the Attorney General may "enter into agreements with the State, its political subdivision or grantee or a lessee thereof respecting operations under existing mineral leases and payment and impounding of rents, royalties, and other sums payable thereunder." The Act then goes on to say:

> "Payment made pursuant to such agreement, or pursuant to any stipulation between the United States and a State, shall be considered as compliance with section 1335(a)(4) of this title."

The subsection of 43 U.S.C. 1335 referred to provides that "any mineral lease covering submerged lands of the Outer Continental Shelf issued by any State (including any extension, renewal or replacement thereof heretofore granted pursuant to such lease or under the laws of such State)" shall be subject to validation if "all rents, royalties and other sums payable" thereunder "are paid to the Secretary" (of the Interior). Thus payments made to a State pursuant to an agreement between it and the United States made under authority of Section 7 of the Outer Continental Shelf Lands Act are equivalent to payments made to the Secretary of the Interior and thus to the United States.

The only remaining question then is whether payments made to the State of Louisiana prior to entry of the Decree of June 16, 1975 (422 U.S. 13) under mineral leases covering areas lying in Zone 1 as defined in the Interim Agreement come within the meaning and operation of

this Act. The Interim Agreement contains no specific language regarding payments derived from mineral leases on areas lying within Zone 1 and Zone 4, although it does specifically provide that revenues derived from such leases on areas lying within Zones 2 and 3 (which are referred to as the "disputed area") shall be impounded. And it contains the following provision (Paragraph 6):

> "Notwithstanding any adverse claims by the other party hereto, the State of Louisiana as to any area in Zone No. 1, and the United States as to any area in Zone No. 4, shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party."

Pursuant to this provision, the State of Louisiana did in fact collect and retain rentals on mineral leases on areas lying within Zone 1 and the United States did so on those areas lying within Zone 4. Neither party questioned the other's right to do so, and so it is apparent that both considered that the right to "exclusive supervision and administration" included the right to collect and retain those rentals. Payments to the State pursuant to the Interim Agreement were therefore authorized under Section 7 of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1336) and under Section 6 thereof (43 U.S.C. 1335) are equivalent to payments to the United States and therefore are not now recoverable by it.

The Court recognized the validity of the Interim Agreement in its decree of June 16, 1975 (422 U.S. 13), saying in Paragraph 13 thereof:

> "Nor shall anything in this Decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this Decree, be-

tween the parties or between a party and a third party, especially, but not limited to, the Interim Agreement of October 12, 1956, as amended, which Agreement remains in effect except as explicitly modified hereby."

The only other explicit references in the decree to the Interim Agreement are in Paragraphs 2, 4, 5, and 7, all of which deal with funds "now held impounded" (or, in Paragraph 7, "heretofore impounded"). While it is true that Paragraph 7 requires the State to account for "any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources described in Paragraph 1 hereof" (those lying more than three geographical miles seaward of the base line as established by the decree) the only payment called for under that paragraph is that, in the absence of objections, "the party whose obligation to the other party is shown by such accounts to be the greater shall forthwith pay to the other party the net balance so shown to be due"; and that if there are objections, then any undisputed balance shall be so paid. This can hardly be considered an explicit modification of the Interim Agreement.

Louisiana apparently anticipated the possibility that some portions of the areas in Zone 1 upon which it granted leases (as it was specifically authorized to do under the Interim Agreement) might ultimately be adjudged to belong to the United States, as it inserted in all of those leases except two a provision that it was leasing the right to extract minerals only from those parts of the described areas "belonging to the State of Louisiana" or such as were "owned by the State of Louisiana." Whether this language gives rise to a claim by the United States against

the lessees is not now before the Special Master for consideration, but it does tend to negative any claim by the United States against the State of Louisiana.

The purpose of the Interim Agreement was clearly to settle the rights of the parties to the extent that this could be done pending final determination by the Court. Under it, Louisiana was given "exclusive supervision and administration" over all areas lying within Zone 1, and this was recognized by both parties to include the right to collect rents from mineral leases in that zone and to expend the funds so collected without impoundment. This agreement remained in full force and effect until the entry of the decree of June 16, 1975,[5] under which its terms were validated except as therein explicitly modified, therefore the State is entitled to keep all rentals derived prior to the entry of that decree from mineral leases upon areas lying within that zone, and the United States has no right to recover them.

Third Issue

Does Louisiana have the obligation to account for as unimpounded funds and to pay to the United States money collected by it as severance taxes on minerals removed from areas subsequently determined to belong to the United States?

Here again the issue is raised by objection by the United States to Louisiana's unimpounded fund accounting,

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5. The provision of the Interim Agreement itself as to termination is as follows:

> "This stipulation and agreement shall terminate as to any area, upon the final settlement or determination of the aforesaid controversy with respect to such area; and *thereafter* the successful party shall have exclusive jurisdiction and control over the area so determined to be owned by it to the extent fixed by the decision in the final adjudication." (Emphasis supplied)

and therefore the burden of persuasion is upon the United States. Ordinarily when a tax is illegally assessed and collected, the right of recovery thereof is with the payor. But the United States insists that the so-called "severance tax" collected by Louisiana in this case (pursuant to La. Const. Art. X, Sec. 21; La. Rev. Stat. 47:631-636) was not in fact a tax but a form of additional royalty. It bases this position upon the fact that the tax is immediately related to the minerals extracted and is a kind of substitute for the loss of a public asset. It argues that where it has been determined that the area from which the minerals were extracted lies beyond the taxing jurisdiction of the State, the amount of the tax should go to the sovereign having a right to impose it.

This argument appears, however, to be without merit. The Louisiana severance tax is not a substitute for the loss of a public asset, as it is imposed upon minerals extracted from privately owned areas within the State as well as those which are publicly owned. The fact that it is immediately related to the minerals extracted is not significant, as many taxes are so measured. The Louisiana severance tax has all of the characteristics of a true tax, and if it was wrongfully assessed and collected, then it is up to those who paid it to seek redress.

Par. 6(a) of the Decree of June 16, 1975 (422 U.S. 13) requires the State to account for "any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources" adjudged to belong to the United States. This language was clearly intended to apply to proprietary revenues, not taxes. If the Louisiana severance tax is a true tax, as indicated above, and not an additional royalty, then it does not come within it.

The United States argues, however, that as it has under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1336) collected on minerals extracted from areas within Zones 2 and 3 now adjudged to belong to the State of Louisiana "a sum of money equal to the amount of the severance - - - taxes which would have been payable on such production to the State issuing the lease under its laws as they existed on the effective date of this Act," which sums have now been paid over to the State, it is only equitable that the State should now pay to the United States the amount collected by it as severance tax upon minerals extracted from areas now adjudged to belong to the United States. This, however, does not necessarily follow. These collections by the United States were admittedly not in the form of taxes but of additional revenues, and as such they were impounded under the Interim Agreement and disbursed as a part of the impounded funds pursuant thereto. In this they differ materially from the severance taxes collected by the State of Louisiana. It may be that the United States has a claim for additional royalties against the lessees of areas adjudged to it on which no previous collections under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1336) have been made, but if so, it must look to those lessees for that additional payment, not to the State of Louisiana.

SUPPLEMENTARY

A preliminary draft of this report has been submitted to counsel for both parties and, without of course concurring in the conclusion in every case, a number of suggestions have been made as to the form of specific findings of fact, some of which have been adopted in this final report.

In this respect and in many others counsel have been most helpful. In addition, the State of Louisiana has requested additional findings of fact, which request along with the Special Master's ruling thereon, is attached as an appendix to this report.

RECOMMENDATIONS

For the foregoing reasons, the Special Master recommends that all objections to the amended and corrected accountings filed by each of the parties be overruled, and those accountings be approved as filed.

Respectfully submitted,

WALTER P. ARMSTRONG, JR.
Special Master

August 27, 1979

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

MOTION OF THE STATE OF LOUISIANA TO HAVE THE SPECIAL MASTER MAKE ADDITIONAL FINDINGS OF FACTS TO BE INCLUDED IN A SUPPLEMENTAL REPORT TO THE UNITED STATES SUPREME COURT

MAY IT PLEASE THE SPECIAL MASTER:

The State of Louisiana, appearing herein through undersigned counsel, respectfully moves that additional findings of facts be included in the supplemental report to be filed with the United States Supreme Court as follows:

I.

Louisiana's Claim for the Increment that Should Have Been Earned on the Share of Louisiana's Money Held Under the Interim Agreement of October 12, 1956

1. The agreement between the State of California and the United States to impound funds referred to by the United States took place prior to the enactment of

the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953. (U.S. Exh. 43 and 44; La. Exh. No. 1 - LPI No. 2)

2. After the passage of the Outer Continental Shelf Lands Act, Mr. J. Lee Rankin, Assistant Attorney General of the United States, sent to California a proposed stipulation which contained the following provision:

> "The United States may invest and reinvest any of the funds covered by this paragraph in obligations of the United States Government, and all interest received, as well as any increase or decrease in the value of the investments, shall accrue to or be charged against said fund as the case may be." (La. Exh. No. 9 - LPI #166)

This was followed by a letter referring to the proposed stipulation in which Mr. Rankin said:

> "This draft contained authority for the United States to invest the funds held by it." (La. Exh. No. 9 - LPI #167)

Louisiana was not advised as to Mr. Rankin's letter at the time the Interim Agreement was entered into in 1956 and only learned of the letter during the trial of this phase of the case. (Tr. 800)

3. The United States admitted that Louisiana and the United States could amend the 1956 Interim Agreement to impose on the United States a requirement to invest the funds or pay interest on the funds. (p. 3, Post-Trial Brief of the United States on the "Interest Issue")

4. Both houses of the Legislature of the State of Louisiana passed Concurrent Resolution No. 251 on June 6, 1967, containing the following provision:

> "Be it Further Resolved that the Legislature of Louisiana does hereby respectfully request and urge the above named officials to *take such steps as are necessary to effect a prudent and effective investment* of the funds now and hereafter so impounded, *with a view to increasing the increment* deriving both to the Federal Government and to the State of Louisiana." [Emphasis added] (La. Exh. 12 - LPI #179)

The above Resolution was sent to various Government officials.

5. Instead of investing the funds, Mr. Carlock wrote a letter to Louisiana on July 14, 1967, in which he stated, on behalf of the Treasury Department, Department of Justice and other Departments of the Government, that:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of statutory authority." (U.S. Exh. #51)

6. Mr. George S. Swarth, an attorney, the only Federal negotiator to testify, admitted that the holding of the impounded fund by the Treasury was a fiduciary responsibility. (Dep. Tr. 9)

7. All new drilling and leasing for oil and gas in the disputed zone in the Gulf of Mexico off the coast of Louisiana was enjoined in 1956 by the United States Supreme Court on the application of the United States, except by agreement between the United States and the State of Louisiana. (*United States v. Louisiana,* 351 U.S. 978)

8. Enjoining the drilling and leasing for oil and gas off the coast of Louisiana had a severe economic impact

on the coastal parishes of Louisiana. Under these circumstances, the Interim Agreement of October 12, 1956 was entered into to permit the United States and Louisiana to resume the drilling and leasing for oil and gas in the Gulf of Mexico off the coast of Louisiana. (See preamble to La. Act 38 of 1956, La. Ex. I - LPI #3; Tr. 62-64; Tr. 108-112; Tr. 158; Tr. 112-117)

9. In June of 1956, before commencement of the negotiations for the Interim Agreement, the United States Department of Justice interpreted the word "impounding" under Section 7 of the Outer Continental Shelf Lands Act to mean "hold in escrow" by the filing in the United States Supreme Court of a Memorandum for the United States on the Maintenance of Status Quo, which contained the following representation on behalf of the Federal Government:

> "The United States stands ready and willing to enter into an agreement with Louisiana to hold all proceeds of leasing in the disputed area in *escrow* pending a determination of the case on its merits." [Emphasis added] (No. 15 Original, *United States v. Louisiana*, June 1956)

10. During the negotiations for the Interim Agreement, the Federal negotiators represented to Louisiana that the money from the disputed area would be held in escrow. (La. Exh. No. 1 - LPI Nos. 38, 39 and 40; Tr. 50-54)

11. Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly confirmed by Federal officials. (La. Exh. No. 1 - LPI Nos. 20, 21, 22, 23 and 45; Tr. 206, 208, 210)

12. Mr. Arnold Petty, Assistant Director of Administration for the Bureau of Land Management, agreed with the characterization of the Interim Agreement as "in effect our escrow agreement." (Tr. 444)

13. Dr. John Haslem, expert witness for the United States, gave his opinion that the Federal Government treated the account under the impoundment provisions of the Interim Agreement in the same manner as a bank would treat an escrow account. (Tr. 836)

14. The Pre-Trial Order dated May 26, 1976, fixing the issues to be heard by the Special Master, approved as to form by the United States and Louisiana and signed by the Special Master, provided:

> "*Issue No. 1*: Whether the United States is obligated to account for the value of the use of the state's share of the *escrow fund* or for interest on the fund." [Emphasis added]

15. United States' officials represented to California that the identical deposit fund account used subsequently in this case was in the nature of a trust. (La. Exh. No. 1 - LPI Nos. 152, 153, 154 and 155; Dep. Tr. 39; La. Exh. No. 9 - LPI No. 161/U.S. Exh. No. 47 with attachment)

16. The *Dictionary for Accountants* by Eric T. Kohler defines "impound" to mean "to seize and hold in protective custody . . . cash and other assets." (Tr. 281 and 311)

17. Mr. Jerry Walker, expert witness for Louisiana, testified that the requirement in the Interim Agreement that the revenues from the disputed area be "held intact" required that the money be invested after a reasonable length of time. (La. Exh. No. 1 - LPI No. 49; Tr. 260-266; Tr. 900-901; Tr. 256-257)

18. The deposit fund account 14X6709 is a liability account, which is a bookkeeping tabulation of the potential liability of the United States and has nothing to do with the holding or use of the money from the disputed area required to be impounded under the Interim Agreement. (Tr. 221-222, 227, 296-297, 311-312, 347-348, 893-894, 890-892 and 398-399)

19. The negotiators for both parties to the Interim Agreement contemplated that the Agreement would exist for only a short period of time of either six months or one year. (La. Exh. No. 1 - LPI No. 6 at p. 11; Tr. 125-126)

20. Louisiana negotiators were not aware of the manner in which the United States had handled the funds derived from mineral leases off of the California coast nor with the details of the negotiations leading up to the execution of the 1947 and 1951 stipulations between California and the United States. (U.S. Exh. No. 67; Dep. Tr. 15; Tr. 27, 92-93, 106-107, 153 and 654)

II.

Louisiana's Claim that the Federal Government Should Account for its Unjust Enrichment Resulting from the Unauthorized Use of Louisiana's Share of the Revenues from the Disputed Area

21. The United States used Louisiana's share of the money required to be impounded under the Interim Agreement without any compensation to Louisiana. (Responses by the United States to Louisiana's First Request for Admissions, Nos. 1, 2 and 3; La. Exh. No. 1 - LPI Nos. 41 and 42; Tr. 187; Response by United States to Interrogatory No. 8 of Louisiana's First Set of Interrogatories; Tr. 200-202; La. Exh. No. 1 - LPI Nos. 19, 20, 21 and 22; Tr. 198; Tr. 213-216; La. Exh. No. 1 - LPI No. 48;

Tr. 217-218; La. Exh. No. II - LPI Nos. 182-183; Tr. 904-909)

22. The United States benefited from the use of Louisiana's share of the money required to be impounded under the Interim Agreement to the extent that such use reduced its borrowing needs. (La. Exh. No. II - LPI No. 184: Tr. 908-914)

23. The free use by the United States of the money required to be impounded under the Interim Agreement was not authorized by the Interim Agreement, and there was no agreement that the United States need not account to Louisiana for any share of the value of the benefit received from the use of the money required to be impounded. (La. Exh. No. 1; LPI No. 1; Tr. 55, 129, 136; 98;99)

24. No one ever advised the Louisiana negotiators that the United States intended to use for its own purposes, and without compensation to Louisiana, the money required to be impounded by the Interim Agreement. (Tr. 163-164; 175)

25. There was no agreement that the United States need not invest the money. (Swarth Dep. Tr. 7-8; Tr. 57; 77)

26. There was no agreement or understanding that the United States need not pay interest. (Swarth Dep. Tr. 7-8; Tr. 70-71; 102-103; 136; 163-164)

27. The amount of the benefit received by the United States in savings through the use of Louisiana's share of the money required to be impounded pursuant to the Interim Agreement in lieu of borrowing is ascertainable with reasonable certainty and amounts to approximately $88 million. (Tr. 306-308)

28. The United States admitted that there was approximately $300 million still being held by the United States under authority of the 1956 Interim Agreement. (Tr. 481)

29. Louisiana requested the Special Master to order the United States to hold such funds to pay Louisiana's claim for the use of Louisiana's money in the event the Master or the Court made such an award. (Tr. 480-482)

III.

The Special Master is a finder of fact. Therefore, it is extremely important in presenting this matter to the United States Supreme Court that the Court have additional findings of facts by the Special Master from the evidence, to be included in the Master's Supplemental Report or in an addendum thereto.

Submitted this 18th day of June, 1979.

For the State of Louisiana

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By: /s/ Oliver P. Stockwell
Oliver P. Stockwell

PROOF OF SERVICE

The undersigned certifies that copies of the foregoing Motion of the State of Louisiana to Have the Special Master Make Additional Findings of Facts to be Included in a Supplemental Report to the United States Supreme Court have been properly served on the 18th day of June, 1979, by mailing copies, sufficient postage prepaid, to the Solicitor General and the Attorney General of the United States, Department of Justice, Washington, D. C. 20530.

/s/ Booth Kellough
Booth Kellough
Special Assistant Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

ORDER ON MOTION OF THE STATE OF LOUISIANA TO HAVE THE SPECIAL MASTER MAKE ADDITIONAL FINDINGS OF FACT TO BE INCLUDED IN A SUPPLEMENTAL REPORT TO THE UNITED STATES SUPREME COURT

Request No. 1 asks the Special Master to find as a fact that the Interim Agreement of October 12, 1956 between the United States and Louisiana providing for the impoundment of certain funds (hereinafter "Interim Agreement") was executed prior to the enactment of the Submerged Lands Act and the Outer Continental Shelf Lands Act. The date of execution of the instrument in question is apparent on its face. The date of enactment of the two Acts is a matter of which the Court can take judicial notice. There appears to be no dispute upon either point. Therefore there is no necessity for such a finding. This request is therefore denied.

Requests Nos. 2, 4, and 5 ask the Special Master to make findings of fact as to the contents of certain documents which were introduced in evidence during the hearings. The quotations from these documents given in the requests appear to be correct, as well as the statements regarding their preparation, delivery and receipt; however no finding to this effect is required, as the documents speak for themselves. The inferences to be drawn from these documents have already been dealt with in the Special Master's report to the extent necessary, the omission of any reference to them indicating that in his opinion they were not contrary to his holdings as there set forth. These requests are therefore denied.

Request No. 3 asks the Special Master to make a finding of fact based upon a statement contained in the Post-Trial Brief of the United States. This would not be proper as such findings must be based upon the evidence either testimonial or documentary, presented during the course of the hearings, or upon the technical record, and therefore this request is denied.

Requests Nos. 6, 12, 13, 17, and 28 ask the Special Master to find that certain testimony was given by particular witnesses during the course of the hearings before him. The summary of the testimony as given in the requests appears to be correct. However, it is not the function of the Special Master to make findings of fact upon such matters (which are apparent from the record) but upon the ultimate factual issues in the case. Therefore these requests are denied.

Request No. 7 asks the Special Master to make a finding of fact in regard to a decree entered by the U. S. Supreme Court which is a matter of record (351 U.S. 978). This is unnecessary and therefore this request is denied.

Request No. 8 correctly states the facts, but in the opinion of the Special Master those facts are immaterial to the decision of any issue pertinent to the case. The request is therefore denied.

Request No. 9 apparently asks the Special Master to make a finding of fact based upon a memorandum filed in a case not before him. It is therefore denied.

Requests Nos. 10 and 11 ask the Special Master to find that the term "escrow" was frequently used by representatives of the United States both before and after the execution of the Interim Agreement in referring to the manner in which the funds required under it to be impounded would be handled. This appears to be correct; however this fact does not alter the terms of the agreement itself and is therefore in the opinion of the Special Master immaterial. (See Report p. 7). These requests are therefore denied.

Request No. 14 asks the Special Master to make a finding of fact as to the wording of a Pre-Trial Order approved by counsel and entered in the case. As this order is a part of the record, such finding is unnecessary. As to its effect, that is dealt with in Note 2 to the Special Master's report. This request is therefore denied.

Request No. 15 asks the Special Master to make a finding of fact as to certain representations alleged to have been made by representatives of the United States to the State of California in connection with an account maintained by the United States in which that state had an interest. Even if true, this is in the opinion of the Special Master immaterial, and therefore the request is denied.

Request No. 16 asks the Special Master to make a finding of fact as to a definition given in a standard dic-

tionary of accounting. Although the definition as quoted in part is correctly given, this is unnecessary as this is a matter of which the Court can take judicial notice. This request is therefore denied.

Request No. 18 has to do with deposit fund account 14X6709. This has already been dealt with fully in the Special Master's Report (See pp. 12-14). This request is therefore denied.

Request No. 19 asks the Special Master to find that both parties contemplated that the Interim Agreement would be in effect for only a short term. Even if true, this is in the opinion of the Special Master immaterial. This request is therefore denied.

Request No. 20 asks the Special Master to find that the negotiators for the State of Louisiana were not aware of certain negotiations between the United States and the State of California. Whether or not the negotiators were aware of their precedent, the State of Louisiana was charged with such knowledge. The Special Master's Report so finds (p. 13), and such a finding is supported by the evidence. (U.S. Exs. 67, 75, 76, 83) This request is therefore denied.

Special Requests Nos. 21 and 22 ask the Special Master to find that the United States used money impounded under the Interim Agreement ultimately adjudged to belong to the State of Louisiana and benefitted thereby. This has been dealt with adequately in the Special Master's Report (pp. 10-13) and in the opinion of the Special Master no further findings upon this point are necessary. The requests are therefore denied.

Requests Nos. 23, 24, 25 and 26 ask the Special Master to make negative findings, that certain matters were not agreed to by the parties or discussed between their repre-

sentatives. While it appears to be true that these matters were not discussed, the inference to be drawn therefrom has already been considered in the Special Master's Report (pp. 7-8) and nothing further is required. Therefore these requests are denied.

Request No. 27 asks the Special Master to find that the amount of the benefit derived by the United States from the use of funds impounded under the Interim Agreement and ultimately adjudged to belong to the State of Louisiana is ascertainable with reasonable certainty and to fix that amount. In view of the Special Master's finding that the United States is not accountable for any such benefits, if in fact there were any, such a finding is immaterial and unnecessary, and this request is therefore denied.

Request No. 29 asks the Special Master to find that he was requested to order the United States to hold certain funds pending the outcome of this litigation. No formal motion for such an order appears in the record, and had there been such, it would have had to be denied as being beyond the scope of the reference to the Special Master (423 U.S. 909). This request is therefore denied.

Although all of Louisiana's requests for additional findings of fact are denied for the reasons given, Louisiana is entitled to have the benefit of its requests therefor and the Special Master's rulings thereon in seeking review of the Special Master's Report to the United States Supreme Court. Louisiana's Motion and this Order will therefore constitute an Appendix to the Special Master's Report as filed with that Court.

/s/ Walter P. Armstrong, Jr.
Special Master

ENTERED: 7/18/79

SUPREME COURT, U.S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND MEMORANDUM IN SUPPORT OF EXCEPTION

WADE H. MCCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 9, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States respectfully excepts to the Report of the Special Master insofar as he recommends overruling its objections to the accounting filed by the State of Louisiana and excusing the State from accounting for or paying over to the United States monies collected by the State since June 5, 1950 (other than severance taxes and administration fees) derived from or attributable to submerged lands adjudicated to be within the exclusive domain of the United States.

WADE H. MCCREE, JR.
Solicitor General

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 9, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA; ET AL.

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF ITS EXCEPTION

STATEMENT

This is the final chapter in the litigation initiated in 1948 between the United States and the State of Louisiana over the right to exploit the valuable mineral resources of the seabed off the coast of that State. See *United States* v. *Louisiana*, 339 U.S. 699. At length, the territorial dispute was resolved, the boundary between federal and state submerged lands

was fixed,[1] and each party was directed to account for revenues derived from areas adjudicated to the other sovereign. Decree of June 16, 1975, paras. 5-7, 422 U.S. 13, 15-17. In due course, such accountings were filed, but objections were interposed and the matter was referred by the Court to its Special Master. 423 U.S. 909 (1975). The Master held hearings and has now filed his Report.

1. During the proceedings before the Special Master three issues emerged, which are addressed by the Report now before the Court. The first is whether the United States owes Louisiana "interest," or some like sum, in respect of the revenues derived from areas ultimately adjudicated to the State, which revenues were "impounded" in the Federal Treasury under a 1956 Agreement before being paid over to Louisiana in 1975. The Master having rejected the State's claim on this score (Report 4-15), we have no occasion to address it at this stage. If (as we anticipate) Louisiana excepts to the Master's ruling, we shall of course respond.

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[1] The Decree of June 16, 1975 (422 U.S. 13, 13-14, 19-34) defined the Louisiana "coastline"—the baseline from which the three-mile belt of submerged lands granted to the State by the Submerged Lands Act of 1953 (43 U.S.C. 1301-1315) is measured—rather than the boundary between state and federal lands. However, as directed by paragraph 11 of that Decree (422 U.S. at 18), the parties have established the boundary line (three geographical miles seaward) and the description of that line was filed with the Special Master. In due course, the Court will be invited to enter a supplemental decree incorporating that description.

The remaining issues relate to the State's denial of any obligation to turn over to the United States monies paid to Louisiana by oil and gas lessees since 1950 in respect of areas now determined to belong—and to have belonged since before 1950—to the United States. Although the State, in its filed accounts, has admitted receipt of substantial sums so attributable (some $23 million), it asserts a right permanently to retain these monies. In larger part, the payments in question represent rents, royalties and bonuses; in lesser part, severance taxes collected by the State from the same operators. In both instances, the Master has recommended sustaining the State's position (Report 15-21).

For a variety of reasons—including a reluctance to burden the Court with an esoteric and complex question of no recurring importance—we are not excepting to the Master's conclusion with respect to the State's obligation to pay over to the United States the severance taxes attributable to the extraction of minerals beyond State jurisdiction. But we cannot similarly acquiesce in the holding that Louisiana is also excused from accounting for some $19 million received in oil and gas revenues derived from federal lands in what is termed "Zone 1." On this matter, we except. The present brief is limited to that issue.

2. The question we address here arises because some of the areas ultimately adjudicated as beyond the Submerged Lands Act grant to Louisiana, and there-

fore within federal ownership,[2] were, over the last three decades, administered by the State, which received and retained mineral revenues from the operators there. Before October 1956, Louisiana was acting unilaterally in leasing these areas and collecting rents and royalties; after that date, the State was acting with the acquiescence of the United States, given by the Interim Agreement of October 12, 1956.

The areas involved are portions of "Zone 1", the most shoreward belt of submerged lands defined by the 1956 Interim Agreement. The Agreement assigned the administration of that Zone to Louisiana pending a final adjudication. It is now settled that this assignment did not foreclose federal claims within the Zone and, indeed, the present issue arises because some Zone 1 lands were ultimately decreed to belong to the United States. But the State argues, and the Special Master held, that, by permitting Louisiana to administer all of Zone 1, the United States waived its right to demand an accounting and payment with respect to revenues derived from its lands in the Zone, both during the life of the Agreement and earlier.

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[2] As a matter of convenience, we speak of federal "ownership" and "title," and characterize submerged lands as "belonging" to the United States. Strictly speaking, that may not be correct usage. See 339 U.S. at 724 and n.* (opinion of Frankfurter, J.). But it is of course immaterial to the issues now before the Court whether the "paramount" and exclusive right of the United States to exploit the resources of a portion of the seabed be characterized as "proprietary" or otherwise.

The Special Master believed this result was compelled by a provision of the Outer Continental Shelf Lands Act, 43 U.S.C. 1336, which he read as foreclosing any federal claim to monies paid to a State pursuant to a working agreement. Report 16-17. Although the Report does not specifically focus on revenues collected by Louisiana between June 5, 1950, and the execution of the Interim Agreement on October 12, 1956—which would not appear to qualify as payments made to the State by lessees "pursuant to [an] agreement"—we understand the Master to have excused Louisiana from accounting for these sums as well.[3]

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[3] At one point in the present phase of the proceedings, Louisiana appeared to be admitting an obligation to account for unimpounded funds it collected from federal lands *outside Zone 1* before the Interim Agreement of 1956. According to the State, the total of such revenues, after deducting sums "accounted for" (albeit neither paid nor offset) in 1966, was just over $1 million. *First Accounting of the State of Louisiana Required by the Supplemental Decree Rendered on June 16, 1975* (Aug. 1975), at 1-2, 8-14. In light of our initial unimpounded fund accounting indicating revenues of some $2.8 million that should be paid over to Louisiana (subject to offsets), the State claimed payment of $1.75 million as an "undisputed net balance" under paragraph 6(c) of the 1975 Decree. *Objections by State of Louisiana to Accountings and Payments by the United States Under the Supplemental Decree of June 16, 1975 and Brief in Support Thereof* (Oct. 1975), at 2-3. However, the United States contested the adequacy of Louisiana's accounting, including the denial of any liability with respect to Zone 1 monies, *Objections of the United States to the State of Louisiana's Accounting of August 15, 1975* (Oct. 1975), at 2-3, and there is, accordingly, no undisputed net balance due the State. Louisiana has now withdrawn its admission of liability in respect of revenues

ARGUMENT

A. Introduction And Summary

1. Several factors have influenced our decision to except to the Master's recommendation that Louisiana be excused from accounting for revenues collected from federal lands in Zone 1. Not least is a belief that the Zone 1 ruling unjustly rewards a litigation strategy that, over three decades, has included any and every argument, however far-fetched, apparently put forward in the hope of appealing to the judicial reluctance to reject *all* the submissions of any party and in the knowledge that, at all events, the final day of reckoning would thereby be postponed.[4]

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from federal lands outside Zone 1. *Composite and Summary of Significance of Accounting Data from Prior Louisiana Accountings* (filed with the Special Master, Aug. 1978), at 3, 6-7. The Special Master did not address this last minute change of position by the State.

[4] We do not exaggerate. On the procedural side, Louisiana has repeatedly challenged the Court's jurisdiction, urging the overruling of *United States* v. *Texas*, 143 U.S. 621 (1892), and *United States* v. *California*, 332 U.S. 19 (1947), and all intervening precedents. See 337 U.S. 902 (1949); 339 U.S. 699, 701 (1950). The State has moved for trial by jury, see 339 U.S. at 703, for leave to take depositions, see 352 U.S. 979 (1957), 363 U.S. 1, 84 (1960), for transfer of the case to a district court, see 363 U.S. at 85 n.143, and for dismissal, see 338 U.S. 806 (1949), 352 U.S. 812 (1956). Dilatory tactics by Louisiana have repeatedly led the Court to direct the State to answer on the merits. *E.g.*, 337 U.S. 928 (1949); 338 U.S. 806 (1949); 352 U.S. 812 (1956); 355 U.S. 876 (1957).

Nor has Louisiana been less extravagant when arguing on the merits. It has asserted a special exemption from the principles settled in both the first and second *California* de-

In our view, Louisiana's latest claim, advanced for the first time in late 1975, is wholly without merit. Its acceptance would merely confirm the value of delay. Indeed, under the Master's ruling, Louisiana keeps a larger sum because its strategy prevented resolution of the territorial dispute until 1975.[5] And even the sustaining of our exception by this Court will not affect Louisiana's retention of the severance taxes it has collected during this extended period.

We stress, also, that the single question we bring to the Court is not primarily an issue of fact. The answer turns on the true construction of a formal written Agreement, Decrees of this Court, and an Act of Congress. Indeed, the Master relied entirely on the statute for his conclusion, without purporting to resolve any factual dispute (Report 15-19). At all

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cisions (332 U.S. 19 (1947); 381 U.S. 139 (1965)). See 339 U.S. at 705; 363 U.S. at 78; 394 U.S. 11, 21, 32-33, 72-73 (1969). And, at various times, the State has claimed submerged lands extending 27 miles from shore, see 339 U.S. at 703, 705; or to the 27th parallel, at all point well seaward of the continental shelf, see 363 U.S. at 71; or to the edge of a belt 3 or 9 miles from the "Coast Guard Line," itself sometimes 30 miles from shore, see 363 U.S. at 79; 394 U.S. at 19, map opposite 78; or 3 miles from the seaward end of dredged channels, some jutting 20 miles into the Gulf, see 394 U.S. at 36-40.

[5] Nor is it clear that Louisiana accepts the date of the Decree effectively resolving the boundary question—June 16, 1975—as the cut-off point for its alleged right to retain revenues received from federal lands. On the contrary, after the case had been finally submitted to the Special Master, the State indicated that its claim for exemption is continuing. We asked the Master to address this contention, but Louisiana objected and the Master declined to reach it. Of course, if our exception is sustained, this further issue will be mooted.

events, there is no suggestion that the result depends on the appraisal of witnesses or the weighing of evidence introduced in the hearings. Accordingly, the Court is under no disability in reviewing the Master's determination.

In these circumstances, and given the substantial sum at stake and the potentially inhibiting reading given to the Outer Continental Shelf Lands Act, we ask the Court to decide the question anew.

2. The Special Master has recommended that the State of Louisiana be excused from paying over to the United States all revenues received by the State during the pendency of this controversy since 1950 from submerged lands now finally determined to have at all relevant times belonged to the United States (Report 15-19). According to the Master, this admittedly extraordinary result—at odds with every decree of the Court governing the case and never suggested by the State itself until 1975—is required because, in 1956, the United States agreed that payments from the area in question ("Zone 1") might continue to be made to Louisiana *pendente lite*. The Master does not suggest that anyone in 1956—or for the next two decades—understood that allowing the State to enjoy these revenues would foreclose a later accounting. But the consequence is said to follow as a matter of law under the Outer Continental Shelf Lands Act. We respectfully disagree.

Although, in deference to the Special Master, we pursue it at some length, our argument is straightforward.

a. We begin by stressing the ground rules of the litigation, laid down in 1950. At that time, this Court held that the United States, rather than Louisiana, was entitled to the mineral resources of the seabed beyond the State's coastline and that Louisiana must account for and pay over to the United States all mineral revenues derived since June 5, 1950 from areas seaward of that line. Our submission is that the State's accounting obligation, although postponed, remains unchanged, except only that the Federal-State boundary was moved three miles seaward.

b. The seaward shift of the dividing line was accomplished three years later by the Submerged Lands Act of 1953. But this Court, in its 1960 decision, definitively settled that the Act had no other effect. Although Louisiana was granted a three-mile belt of submerged lands from its coastline and was forgiven any duty to account for monies earlier collected from that belt, the State remained liable for all revenues derived from more seaward areas since June 1950.

c. Nor did the Interim Agreement of 1956 release that debt. On its face, the Agreement was no more than an interim working arrangement, intended to permit operations—which this Court had enjoined—to resume, without any abandonment of rights on either side. Indeed, far from impliedly waiving federal monetary claims in the area where Louisiana's administration was permitted to continue for the time being—"Zone 1"—the Agreement expressly reserved all rights and claims of both parties. There is, more-

over, no rational explanation for such a one-sided concession by the United States.

d. Reliance on the Outer Continental Shelf Lands Act as foreclosing any federal claim in respect of revenues paid by agreement to Louisiana is, we submit, wholly misplaced. That statute releases the *lessee* who paid the State pursuant to an agreement between the sovereigns from being required to make duplicate payments to the United States. It is not clear whether this is a permanent waiver of the lessee's obligation, or a mere postponement until the title dispute is resolved. But, however that may be, there is no basis whatever for reading into the Outer Continental Shelf Lands Act a bar to the federal claim against a *State* that has collected rentals and royalties properly payable, as it turns out, to the United States.

e. Finally, we note that never before late 1975 did Louisiana assert exemption from an accounting obligation with respect to Zone 1. Indeed, in 1960 and 1965 the State expressly joined in submissions, and the Court entered decrees, that carried forward, unchanged, the requirement that the State account for, and pay over, all monies collected from federal lands, wherever situated. And that principle is explicitly confirmed by the Court's most recent decree in June, 1975.

In sum, Louisiana's present argument contradicts the avowed understanding of the parties repeatedly confirmed by the Court. An idea so long hidden from view and brought forward for the first time on the

eve of the day of reckoning—delayed three decades—does not commend itself. Seldom can a creature so conceived survive exposure to the probing elements. This instance, we submit, is not such an exception.

B. The Ground Rules Of The Litigation

Since the very beginning, one object of this litigation has been to require Louisiana to account for, and pay over to the United States, revenues earlier derived by the State from federal submerged lands. When Louisiana and Texas made clear their refusal to be bound by this Court's decision in *United States* v. *California*, 332 U.S. 19 (1947), the United States sought and obtained leave to initiate separate suits against those States. See 337 U.S. 902 (1949); 337 U.S. 928 (1949). At that time, we sought an accounting for monies collected by the States from the claimed area since June 23, 1947, the date of the *California* decision. See 339 U.S. 699, 701 (1950); 339 U.S. 707, 709 (1950). The Court agreed, although, in deference to the States, the starting date for the accounting was changed to June 5, 1950, the day of the Court's decision in the *Louisiana* and *Texas* cases. 340 U.S. 899, 900 (1950); 340 U.S. 900, 901 (1950). That ruling, announced in December 1950, itself required the States to account for past receipts. But, more important, it fixed the accounting date for all future proceedings.

In sum, the first decree of this Court, almost three decades ago, established the law of the case: mineral

revenues belong to the owner of the submerged lands that produced them—regardless which party granted the lease, administered the area or received the payments from the lessee—and those monies must ultimately be accounted for and paid over to the true owner. Significantly, that principle was laid down quite independently of the Submerged Lands Act and the Outer Continental Shelf Lands Act, not yet enacted. The right of the United States to enjoy the revenues from submerged lands beyond the line of State ownership, and to require the State to pay over receipts from more seaward areas, simply derived from the holding of the *California* case, now made applicable to Louisiana and Texas. We submit that remains the governing rule.

In March 1951, with a view to implementing the Decree of December 1950, the United States proposed a line of demarcation between federal and state submerged lands off the Louisiana coast. This was the so-called "Chapman Line," later used as a basis for defining "Zone 1" in the Interim Agreement of 1956. Four months later, the State, although disputing the correctness of the line, submitted an accounting of its oil and gas receipts seaward of that line. See Hearings on S.J. Res. 13 Before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 271-272 (1953). The matter was not pursued, however, because legislative proposals leading to the Submerged Lands Act of 1953 were pending before the Congress.

C. The Submerged Lands Act Of 1953

One might suppose that the Submerged Lands Act of 1953 (ch. 65, 67 Stat. 29, 43 U.S.C. 1301-1315) had entirely changed the ground rules. It did not. To be sure, the Act had important effects on the litigation. It granted—or "confirmed"—to the coastal States a three-mile belt (or up to nine miles for the Gulf States if a more seaward "historic" boundary could be shown) and "release[d] and relinquishe[d] all claims of the United States * * * for money * * * arising out of [past] operations" within that belt. 43 U.S.C. 1311(b)(1). But, for areas beyond the State's territorial waters, the obligation to account and pay over remained unchanged.

This is not to say that Louisiana immediately accepted the limited scope of the Submerged Lands Act. On the contrary, the State for some time argued that the Act had wiped the slate entirely clean and, at the same time, it redefined its "boundary" very expansively as a line nine miles beyond the "Inland Water Line" promulgated by the Coast Guard. La. Act 33 of 1954. Nor was the question resolved for some years. After our motion to modify the old decree in light of these intervening events was denied, 350 U.S. 812 (1955), the United States sought and obtained leave to file a fresh original complaint. 350 U.S. 990 (1956). Louisiana, as well as some of its subdivisions and lessees, exhausted every expedient to block or delay resolution of the dispute in this Court. See, *e.g.*, 351 U.S. 978 (1956); 352 U.S. 812 (1956); 352 U.S. 885 (1956); 352 U.S. 979 (1957); 353 U.S.

903 (1957); 353 U.S. 928 (1957). The matter was first argued in April 1957, but the Court ordered the case expanded to include the other Gulf States, 354 U.S. 515 (1957), and there were further delays and postponements. See 355 U.S. 859 (1957); 355 U.S. 876 (1957); 355 U.S. 945 (1958); 356 U.S. 928 (1958); 358 U.S. 902 (1958); 359 U.S. 901 (1959). At length, the case was re-argued in October 1959. Even then, further briefing was allowed, see 361 U.S. 802, 872 (1959), and the decision was not announced until May 31, 1960. 363 U.S. 1.

When it came, however, the ruling was unambiguous. The Court left no doubt as to the continued vitality of the original ground rules. 363 U.S. at 7, 83. Indeed, on the question of accounting for the past, the opinion was at pains to be very clear (363 U.S. at 83 n.140):

> On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. The Submerged Lands Act, passed in 1953, by which parts of those lands were relinquished to the States, also forgave any monetary claims arising out of the States' prior use of the lands so relinquished. But the United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished.

In a moment, we shall have occasion to stress the date of this decision—four years *after* the United States is said to waived any claim to revenues from some of its lands in Zone 1—and the failure of the Special Master to explain how that circumstance tallies with his ruling. But, at this point, we invoke the 1960 decision only as settling that the Submerged Lands Act itself in no way modified the State's obligation to account for, and pay over to the United States, revenues from areas beyond the congressional grant, wherever that boundary might be determined to be. We now turn to the Interim Agreement of 1956 which is said to have changed the rules.

D. The Interim Agreement Of 1956

1. We have already noted that shortly after the enactment of the Submerged Lands Act of 1953—granting the Gulf States a belt of submerged lands extending a minimum of three and a maximum of nine miles from the "coastline"—Louisiana, by statute, adopted as its "coastline" the "Inland Water Line" drawn by the Coast Guard well out at sea. La. Act 33 of 1954; see 394 U.S., map opposite p. 78. Accordingly, the State felt authorized to grant mineral leases and collect revenues in an area viewed by the United States as far beyond the Submerged Lands Act grant and subject to federal leasing. This conflict, as we have indicated, led to the renewal of the litigation in 1955. The United States returned to this Court, see 350 U.S. 812; 350 U.S. 990, while Louisiana sought a ruling in its own courts. In May 1956

—after this Court had granted the United States leave to file a new complaint—the State courts enjoined a federal leasing offer and Louisiana was itself offering leases in the disputed area. We applied for relief in this Court, see 351 U.S. 946, and, on June 11, 1956, the Court enjoined all new leasing and drilling in the contested zone "unless by agreement of the parties." 351 U.S. 978.

This injunction created an urgent situation. According to the State, the economy of southern Louisiana was threatened. Oil companies had substantial investment in offshore operations and were forced to severely curtail their activities. This, and personnel layoffs, had an immediate effect on the State. Both the oil companies and citizens of Louisiana demanded that an agreement be reached, as authorized by the Court, which would permit continued offshore operations.

In theory, the parties might promptly have compromised their differences and settled the entire controversy. But, in the climate of the time, that was not practical. Other obstacles aside, there was too much at stake. The State was then claiming all the area between its shores and a line nine miles seaward of the Coast Guard "Inland Water Line"—a zone forty miles wide in some places—whereas the United States construed the Submerged Lands Act as granting Louisiana only a three-mile belt measured from shore or the closing lines of relatively small bays. Nor, considering the complexity of the issues tendered by Louisiana, was it anticipated that a final judicial

resolution of the dispute was imminent. Accordingly, negotiations focussed on a working arrangement that would allow resumption of drilling, without prejudicing the claims of either party. The Interim Agreement of October 12, 1956 resulted. Appendix, *infra*.

2. The Agreement divided the submerged lands off the coast of Louisiana into four zones. Para. 2, App. *infra*, 4a-5a. Zone 1, the nearest to shore, was to be administered by the State. Para. 6, App. *infra*, 8a. Zones 2, 3 and 4, farther offshore, would be administered by the United States, except for certain leases already granted by Louisiana in Zone 2 and the requirement of State concurrence for any new leasing in the same Zone. Paras. 6, 13, App. *infra*, 8a, 20a-23a. Receipts from Zones 2 and 3 were to be "impounded" by whichever government received them, but no such obligation was imposed on the United States with respect to Zone 4 or upon Louisiana with respect to Zone 1. Para. 7, App. *infra*, 8a-12a. Therein lies the problem.

For, as it turned out, the seaward boundary of Louisiana's submerged lands as finally determined does not coincide with the line dividing Zones 1 and 2. The line that separates Federal and State rights meanders back and forth across the old Agreement line between Zones 1 and 2, with some substantial "bulges" on both sides.[6] Louisiana has been successful

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[6] Thus, East Bay and Ascension Bay, large portions of which are now deemed inland water, were not so treated by the baseline used in the Agreement. On the other hand, most of Caillou Bay was enclosed by that line, but is no longer recognized as inland water.

in some of its claims to lands within Zone 2 and the United States has accounted for, and paid over, monies received from such areas. But the State denies any obligation similarly to account for, and pay over, revenues it received from those portions of Zone 1 which the United States successfully claimed.

Of course, surprising as it seems on its face, that result is proper if it is what the Agreement provides. There is, however, no basis in the text of the document for any such conclusion. Although authority to do so has been questioned,[7] we may assume that the United States might have permanently relinquished *all* claims to Zone 1 in 1956. But it is firmly settled that it did not do so, see 394 U.S. at 73-74 n.97,[8] and Louisiana does not now make that argument. Instead, while conceding that Zone 1 remained an area

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[7] Mr. George Swarth, one of the principal negotiators on the part of the United States, whose deposition was introduced in the proceedings before the Special Master, believed the Executive Branch officials who signed the Agreement had no authority to waive the revenues from Zone 1. See U.S. Exh. 104 at 59, 79-80. Even if erroneous, his view is of course relevant to the intention of the parties in 1956.

[8] In its submission to the Court in 1968, Louisiana was *not* asserting that the Interim Agreement constituted a waiver of rights in Zone 1. Rather, it was arguing that earlier representations by the United States to this Court foreclosed the claim to Chandeleur Sound and Caillou Bay, both in Zone 1. See *Brief of the State of Louisiana in Support of Its Motion for Entry of Supplemental Decree No. 2, etc.* (Aug. 1968), Part II, at 133-136, 166-168, 295-297; *Reply Brief of the State of Louisiana to the Brief of the United States on Cross-Motions for the Entry of Supplemental Decree No. 2, etc.* (Sept. 1968), at 57-60 and n.72, 121-122.

in dispute,[9] the State asserts that the United States impliedly restricted its claim there to a declaration of its title and *future* revenues after the boundary was finally established, abandoning its right to revenues from the Zone during the life of the Agreement—as well as for the past (1950-1956).

We say "impliedly" advisedly. There is no word of the Agreement that can be pointed to as accomplishing this waiver. To be sure, Paragraph 6 (App. *infra*, 8a) granted Louisiana "exclusive supervision and administration" of Zone 1 and the State was not required to impound revenues derived from that area. Nor did the Agreement itself provide for eventual repayment of any such revenues derived from portions of Zone 1 ultimately adjudicated to the United States. But this is hardly enough to accomplish a waiver of rights existing quite independently of the Agreement under the Decree entered by this Court in 1950. At all events, the Agreement itself very clearly forecloses any assertion of implied waiver.

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[9] Thus, no argument can be premised on the fact that, for its own purposes, the Agreement defined the "disputed area" as encompassing only Zones 2 and 3. Para. 3, App. *infra*, 5a. If read as a binding waiver of federal claims in Zone 1 and State claims in Zone 4, that definition would prove too much. It would have prevented the adjudication of Caillou Bay to the United States and would have foreclosed, without more, those of Louisiana's "dredged channel" arguments that extended into Zone 4. See 394 U.S. at 36-40. Plainly, the term "disputed area" was mere shorthand, reflecting the focus of the Interim Agreement on Zones 2 and 3—which were, indeed, the *primary* areas in dispute.

As the Court has itself noted, "[t]he Interim Agreement of 1956 specifically recognized that neither party would be bound by its positions." 394 U.S. at 73 n.97. Indeed, the very first substantive paragraph of the Interim Agreement stipulates that nothing in the document shall affect the rights of the parties to Zones 2 and 3 and adds: "nor shall any provision hereof be the basis for questioning, prejudicing or *waiving* in any manner *any right, interest, claim or demand whatsoever* of either party now pending in the proceedings above referred to, *or otherwise.*" Para. 1, App. *infra*, 3a (emphasis added). In like vein, the next paragraph (para. 2, App. *infra*, 4a) explains that the baseline used in drawing the zones [10] was "the so-called 'Chapman-Line'," and then goes on expressly to caution:

> No inference or conclusion of fact or law from the said use of the so-called "Chapman-Line" or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto or of any third party. It is recognized that the so-called "Chapman-Line" has not been actually surveyed and that while the limits of each zone as reflected on the [annexed] Exhibit "A" shall be binding upon the parties for the purposes hereof, said specific limits remain to be finally fixed and determined either by agreement of the parties or otherwise.

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[10] Actually, only Zones 1 and 2 were based on the "Chapman Line." Zones 3 and 4 are related to the Coast Guard "Inland Water Line."

These provisions, we submit, leave no doubt that both parties were reserving any monetary claims they might have outside Zones 2 and 3.

3. There is, in our view, no occasion to go beyond the words of the Interim Agreement. But if we do so, all the pointers lead to the same conclusion. At least one witness for the State conceded that no complete waiver—as opposed to a postponement—of accounting claims in respect of Zone 1 was intended in 1956. See, *e.g.*, Tr. 646. The federal negotiator whose deposition was introduced in evidence (Mr. George Swarth) was clear that such a result was not thought of. U.S. Exh. 104 at 79-80. Accordingly, it is not surprising to find the Master eschewing reliance on any contemporary evidence outside the Agreement. The case for a waiver is no better, however, if we attempt to reconstruct the past for ourselves, without consulting any witnesses. The unanswered question remains why the United States should have entered into such a one-sided arrangement—especially when, as Louisiana reminds us, it was the State negotiators, rather than those representing the federal government, who were under urgent pressure to reach an agreement.

That the waiver as to Zone 1 would have been entirely one-sided is clear enough. Louisiana now suggests that the counterpart was its agreement to claim no accounting in respect of Zone 4. The surface symmetry is wholly illusory. Zone 4 was the area more than nine miles seaward of the "Inland Water Line," officially adopted as the State "coastline," and therefore wholly beyond the most expansive

claim then advanced under the Submerged Lands Act.[11] Any concession affecting Zone 4 was meaning-

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[11] It appears that Louisiana was still nominally claiming the whole of the continental shelf independently of the Submerged Lands Act, presumably on the basis of LaSalle's obvious error in mislocating the 27th parallel. See 363 U.S. at 71. But we cannot suppose that anyone took that claim seriously. It was inconsistent with the boundary fixed by the State Legislature, required overruling the *California*, *Louisiana* and *Texas* cases, and rendered the Outer Continental Shelf Lands Act inoperative off the coast of Louisiana. The demise of that unrealistic contention is told by the State itself (*Brief of the State of Louisiana in Opposition to Motion for Judgment on Amended Complaint by the United States* (Aug. 1958), at 1-2):

> When Louisiana presented its case in April, 1957, it had the view that a divided court having rendered the California decision, which a divided Court followed in the original Texas decision, and the Congress of the United States having disagreed with its conclusions, this Court might well reconsider the entire matter. On such a reconsideration the State of Louisiana, we thought, would prevail. When the case was argued on April 8, 1957, several Justices, including those who had been in the minority in two of the original cases, made it very clear that reconsideration of the original California, Louisiana and Texas cases would not be given. It thus appears that vindication of Louisiana's right to a seaward boundary three leagues from its coast depends upon the interpretation of the Submerged Lands Act, which we think is wholly sufficient therefor (but not for the larger claims heretofore made by Louisiana for the entire continental shelf) and our present argument shall therefore be restricted to the rights which Louisiana acquired from Congress and the President by the enactment of the Submerged Lands Act.

So far as we are aware, the only other basis for a State claim reaching into portions of Zone 4 was that based on "dredged channels." See note 2, *supra*. The birth of that theory, however, appears to have been a decade in the future.

less. By contrast, Zone 1 might well include some federal lands. As paragraph 1 of the Agreement recited, Zone 1 was defined by reference to the unsurveyed "Chapman Line," which, some years earlier, had been hastily drawn with a view to winning agreement. Now that no overall settlement seemed possible, the United States would wish to locate the line more carefully before binding itself.

No doubt, it was expected that most of Zone 1 would ultimately be adjudicated to Louisiana. That is why it was deemed appropriate to permit the State to enjoy, for the time being, the revenues of the area. As Mr. Swarth explained (U.S. Exh. 104 at 22-23):

> It was understood on both sides that Louisiana would certainly recover much of the major part of Zone 1 and we felt that it would be unfair and unnecessary to require them to impound receipts from that area to protect whatever right the Federal Government might ultimately have to a very small part of those receipts. Louisiana needed the income from that area in the meantime and the Federal Government didn't want to deprive it of that current income.

Yet, even then, it was thought probable that an actual survey would disclose inaccuracies in the Zone 1 boundary that would produce, *inter alia*, valuable slivers of federal land within the Zone. For that reason, in the absence of any equivalent concession by Louisiana, the United States was unwilling to abandon its "title" rights within Zone 1. There is no reason to suppose it was any more willing to relinquish its monetary claims there.

To relinquish the revenues while preserving the right to claim title to lands in Zone 1 would not simplify the law suit or hasten its resolution. On the contrary, such an arrangement would give the State every incentive to delay a final adjudication with respect to Zone 1. Enjoying full administrative control and all revenues from the area without any repayment obligation, Louisiana would gain nothing more by a formal declaration of its title. On the other hand, once it became clear the United States might succeed with respect to some part of Zone 1, the State's interest would be to postpone the final adjudication so as to continue enjoying the revenues as long as possible.[12] It would be most extraordinary if we had deliberately created such an impetus for delay.

The obvious answer is that the United States undertook no such waiver of Zone 1 rights. In entering the Interim Agreement of 1956 neither party did more than was necessary to achieve a *modus vivendi* pending judicial resolution of the dispute. No claims were abandoned, no rights were relinquished, on either

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[12] Thus, for instance, when, in 1969, the Court effectively sustained the federal claim to those portions of Caillou Bay lying more than 3 miles off the shore of the mainland and outside the 3-mile belt around the Isles Dernieres, 394 U.S. at 66-67 and nn.87-88, 73-74 n.97, the State—under its present submission—had every reason to postpone a final decree covering that area. In fact, the matter was not formally resolved until 6 years later, and Louisiana asserts the right to retain the revenues received during that period. We had not supposed that this delay would prejudice the amount the United States would ultimately recover from Caillou Bay.

side. In sum, the Interim Agreement left undisturbed the State's obligation to account for and pay over mineral revenues collected from federal lands in Zone 1, whether before 1956 or afterwards.[13]

E. The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462, 43 U.S.C. 1331-1343, was the complement of the Submerged Lands Act, providing in detail for the administration of federal submerged lands beyond those granted to the coastal States. Among other things, the statute authorized agreements with a State "respecting operations under existing mineral leases" and the issuance of new leases "pending the settlement or adjudication" of "a controversy between the United States and a State as to whether or not [submerged] lands" are within federal or State domain. Section 7, 43 U.S.C. 1336.[14] It is

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[13] Neither the State nor the Special Master has sought to explain how the Interim Agreement of 1956 released the debt already accrued in respect of Zone 1 federal lands since mid-1950.

[14] In relevant part, the provision is as follows:

> In the event of a controversy between the United States and a State as to whether or not lands are subject to the provisions of this subchapter, the Secretary is authorized, notwithstanding the provisions of section 1335 (a) and (b) of this title and with the concurrence of the Attorney General of the United States, to negotiate and enter into agreements with the State, its political subdivison or grantee or a lessee thereof, respecting operations under existing mineral leases and payment and impounding of rents, royalties, and other sums pay-

this provision that is recited in the Interim Agreement of 1956 as the authority for the federal signatories. That, we thought, was the only relevance of the Outer Continental Shelf Lands Act to the case. But the Special Master has made much more of it and we must examine the statute more closely.

The Master notes that the Interim Agreement impliedly allowed Louisiana "to collect rents from mineral leases" in Zone 1 and "to expend the funds so collected without impoundment." Report 19.[15] This, of course, is undisputed. The Master then notices Section 7 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1336—which we have quoted in part—and focuses on the provision to the effect that—

> Payments made pursuant to such agreement, or pursuant to any stipulation between the United States and a State, shall be considered as compliance with section 1335(a)(4) of this title.

Viewing the payments made by Louisiana's lessees in Zone 1 as governed by this language, the Master concludes that any federal claim with respect to such payments is foreclosed. In this final leap we cannot join.

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able thereunder, or with the State, its political subdivision or grantee, respecting the issuance or nonissuance of new mineral leases pending the settlement or adjudication of the controversy.

[15] Elsewhere, the Master speaks of "the right to collect and retain those rentals." Report 17. This is, of course, ambiguous: it can mean "retain for the time being, subject to eventual accounting," or "retain unconditionally."

The Master reads far too much into the words just quoted. In specifying that payments to the State pursuant to an interim agreement "comply" with the Outer Continental Shelf Lands Act, the provision means no more than that the lessee is not in default so long as the agreement remains in effect and he makes the payments required by it. There is no permanent waiver of any claim for monies that are due to the United States. It is not clear that the lessee himself is excused from later making up payments that, as it turns out, should have gone to the Secretary of the Interior. Indeed, the very next sentence of 43 U.S.C. 1336 suggests that the lessee has merely postponed his obligation:

> Upon the termination of such agreement or stipulation by reason of the final settlement or adjudication of such controversy, if the lands subject to any mineral lease are determined to be in whole or in part lands subject to the provisions of this subchapter [*i.e.*, federal, rather than state, lands], the lessee, if he has not already done so, shall comply with the requirements of section 1335(a) of this title [which includes, in subsection (4), the requirement of paying to the Secretary of the Interior all lease payments due since June 5, 1950].

But, however that may be, there is no basis for reading into Section 1336 a waiver of the State's independent duty to account. Even if Section 1336 entirely forgives the *lessee* from paying to the United States sums already paid to the State under a working agreement, it would hardly follow that the *State* itself

is released from its obligation to turn over to the United States so much of such payments as appertains to federal lands. The State's debt, we stress, does not derive from the Outer Continental Shelf Lands Act and is not affected by that statute. Louisiana's duty to account was imposed by this Court's 1950 Decree; it was not waived by the Interim Agreement of 1956; and it cannot be excused by a provision of the Outer Continental Shelf Lands Act that deals only with the duties of the lessee.[16]

F. Subsequent Positions And Decrees

Putting aside the Outer Continental Shelf Lands Act—truly a red herring—we return to the funda-

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[16] The Special Master makes the further point that "Louisiana apparently anticipated the possibility that some portions of the areas in Zone 1 upon which it granted leases * * * might ultimately be adjudged to belong to the United States" —witness the insertion of limiting language in all but two leases confining the effective area described in the lease to lands "belonging to" or "owned by" the State. Report 18. Obviously, such no-warranty clauses (as Louisiana would characterize them) tend to *negative*, rather than support, the State's claim to revenues derived from the federal lands within these leases. Nor is the alternative argument premised on these clauses any sounder: that the rentals paid to the State were only "on account" of what turned out to be Louisiana lands, notwithstanding the lease description encompassed also, or indeed primarily, areas ultimately adjudicated to the United States. We are concerned only with leases in Zone 1; the whole of which Zone was claimed as part of the State both by formal legislative act and by solemn representations to this Court, and was, by agreement, reserved exclusively to State leasing. In these circumstances, to say that the Zone 1 federal lands within the lease description were not effectively leased is disingenuous.

mental question whether the Interim Agreement of 1956 excused Louisiana's accounting obligation with respect to Zone 1, focussing now on subsequent events to see what the actions of the parties and the Court over two decades indicate was the common understanding. The answer is not in doubt: until August 1975 it was accepted that Louisiana's duty eventually to account for, and pay over, revenues derived from federal lands in Zone 1 remained unchanged—albeit the day of reckoning had been postponed and the State was not to be viewed as a trespasser until the true boundary was finally adjudicated.

1. We have already noticed that the Opinion handed down May 31, 1960 expressly confirmed the continuing obligation of Louisiana—and the other Gulf States—to account to the United States for revenues derived from areas beyond the limits of the Submerged Lands Act grant, making no exception for Zone 1 administered by Louisiana under the four-year-old Agreement. See 363 U.S. at 83 and n.140. Although neither the Special Master nor the State has sought to explain the Court's failure to exempt Zone 1 from the general rule, we assume it would be put down to an oversight. But, plainly, no such claim can be advanced in respect of the Decree entered some six months later. 364 U.S. 502 (1960).

The Court had invited the parties to prepare a form of decree, see 363 U.S. at 85, and the United States undertook the task. After minor alterations, a draft decree we prepared was accepted by all the defendant States, except, in two respects, by Louisi-

ana. See *Decree Proposed by the United States and Memorandum in Support of Proposed Decree* (Nov. 1960), at 5-9. Significantly, however, that State did not contest its obligation with respect to Zone 1 revenues. It merely objected to the entry of "a money judgment at this time." *Id.* at 8.

This was made perfectly clear a few days later when Louisiana submitted (by telegram) its own proposal for an accounting provision. See *Memorandum for the United States Regarding Louisiana's Suggested Revision of Paragraph 3 of the Proposed Decree* (Nov. 1960), at 6-7. Primarily, the State wished to postpone any repayment obligation until the whole of the Louisiana coastline had been settled and, incidentally, it asked the Court to recognize the 1956 Interim Agreement (which had been filed here but had not been approved). But Louisiana's proposal, on its face, related the Interim Agreement to "the allocation withdrawal and payment of impounded funds" only, expressly conceding the continuing obligation of the State to account for and pay over—subject only to offsets—"all sums of money derived by such state since June 5, 1950 * * * from or on account of any of the lands or resources * * * which lie seaward from the actual boundary of the state." *Ibid.* Presumably, Louisiana was concerned to avoid the political and financial embarrassment of a legislative appropriation in the event a partial adjudication at some future time left the State a net debtor on the interim accounting date, although, in the long run, it would be a creditor.

The decree ultimately entered, 364 U.S. 502, reflects this understanding. In effect, the Court accepted Louisiana's submission in opposition to piecemeal adjudications and mooted the issue of interim payments. The Interim Agreement is referred to, but it is made to control the distribution of *impounded funds* only. With respect to any other sums derived from federal lands, Louisiana, like the other Gulf States, is required promptly to account once the coastline is determined and, "after said account has been rendered and filed with and approved by the Court," it is provided that the State "shall promptly pay to the United States a sum equal to such amounts shown by said account as so derived * * *." Para. 3, 364 U.S. at 503.

There is no possible ambiguity. On the occasion of the first decision entered after the execution of the Interim Agreement, Louisiana itself acknowledged its continued indebtedness in respect of any revenues derived from federal lands in Zone 1 and, in language the State suggested, the Court confirmed that rule in a formal decree. Nor was this the last time the Court and the parties endorsed the principle.

2. The first actual accounting was rendered in 1966, after a partial adjudication. The year before, the parties had effectively agreed upon certain segments of the coastline, with a view to an interim distribution of funds. At the time, the State expressly acknowledged that the federal claim to submerged lands lying more than three miles from the Louisiana coast "and the money accumulated from that area"

was "a logical application of the decree." *Answer of the State of Louisiana to the Motion of the United States for Entry of a Supplemental Decree (No. 1), and Memorandum Accompanying Answer* (Nov. 1965), at 8. No reservation was made in respect of lands within Zone 1 or revenues that had not been impounded.

To be sure, the decree entered on December 13, 1965, does distinguish between impounded and unimpounded monies. Para. 7, 382 U.S. 288, 293. But only the *time of payment* is different: there is no waiver of any debt relating to receipts that were not impounded. Para. 8, 382 U.S. at 294. And, in its subsequent accounting, Louisiana expressly admitted that almost half-a-million dollars of revenues derived from federal lands but not impounded eventually would have to be offset against sums due the State. *Accounting of the State of Louisiana Pursuant to the Supplemental Decree Rendered December 13, 1965* (Feb. 1966), at 2-3.[17] This included receipts from four leases "thought to be within Zone 1" and therefore not impounded. *Id.* at 1, 9.

3. Nor was the present contention advanced during the proceedings at the 1968 Term of Court which led to the major decision of March 3, 1969. 394 U.S. 11. At that time, Louisiana was arguing that the United States was barred from disputing the inland water status of Chandeleur Sound and Caillou Bay,

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[17] In sharp contrast, Louisiana did then object to paying to the United States severance taxes collected in respect of federal lands. *Id.* at 3.

both in Zone 1. But the submission then made had no connection with the present argument. The State was then asserting *title* to these areas, not merely a right to retain receipts. And, the merits aside, Louisiana was claiming that *estoppel* based on a 1960 concession—not the Interim Agreement of 1956—precluded any federal challenge to the areas. *Brief of the State of Louisiana in Support of its Motion for Entry of Supplemental Decree No. 2, etc.* (Aug. 1968), Part II, at 133-136, 166-168, 295-297; *Reply Brief of the State of Louisiana to the Brief of the United States on Cross-Motions for the Entry of Supplemental Decree No. 2, etc.* (Sept. 1968), at 57-60 and n.72, 121-122.

The Court rejected the "estoppel" argument. 394 U.S. at 66-67 n.87, 73-74 n.97. Even then, however, Louisiana did not advance its present position that the Interim Agreement effectively waived any claim to revenues from federal lands in Zone 1. At no point during the proceedings before the Special Master from 1969 to 1974, or those before the Court itself in 1974 and 1975 (see 419 U.S. 814, 990; 420 U.S. 529, 904; 421 U.S. 972), was the point raised. On the contrary (as we elaborate in a moment), the decree agreed to by the parties and entered by the Court on June 16, 1975, expressly required the State to account for unimpounded revenues, which (at least since 1956) necessarily derived from lands adjudicated to the United States in Zone 1.

4. The Decree of June 16, 1975, 422 U.S. 13, implements the Court's decision three months earlier,

420 U.S. 529, approving the Special Master's recommendation in locating Louisiana's Submerged Lands Act "coastline." Although the full description was yet to be formally entered, see 422 U.S. at 19-34, the decision of March 17 itself determined that the true limit of Louisiana's submerged lands was, in some places, seaward of the Zone 1 line, and, in other places, shoreward of that line. As already noted, one major area within Zone 1 adjudicated to the United States was Caillou Bay (beyond three miles from shore). Accordingly, the accounting obligation of the State with respect to Zone 1 was now immediately involved.

As is its usual practice, the Court directed the parties to prepare a decree. See 420 U.S. at 530. The parties agreed on the form of the decree and it was submitted to the Court in a joint motion, signed by the Attorney General of Louisiana and the Solicitor General of the United States. *Joint Motion For Entry of Supplemental Decree, Proposed Supplemental Decree, and Memorandum in Support of Motion* (June 1975). The court adopted the decree as proposed. 422 U.S. 13. In these circumstances, it is hardly open to Louisiana to allege inadvertent error. Yet, it seems plain the 1975 Decree leaves the State no escape from its duty to account for, and pay over, Zone 1 monies derived from federal lands.

Paragraphs 1 and 3 of the Decree declare the rights of the respective sovereigns as divided by a boundary "three geographical miles seaward of the line described in [the detailed description of the coastline attached as] Exhibit A," a boundary which, as noted,

does not in many places correspond with the edge of Zone 1. With the exception of two areas (see para. 10 and Exh. B), it is expressly provided that the coastline described in the decree is to be taken as "the past and present coastline", para. 9, "for all relevant times and purposes," para. 10. Applying these definitions, paragraph 5 requires each party to account for and pay over revenues it had impounded under the Interim Agreement which are attributable to lands adjudicated to the other sovereign.[18] This, according to the State's present submission, is the end of the accounting obligation, save for impounded sums derived from certain split leases, para. 7, and an unresolved claim for "interest" on impounded monies, para. 8.[19] However, the Decree contains the following additional provision (para. 6):

> Within 60 days after the entry of this Decree—
>
> (a) The State of Louisiana shall render to the United States and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale,

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[18] As is happens, Louisiana had impounded no monies attributable to federal lands. In accordance with paragraph 5(b), the United States accounted for, and actually paid to Louisiana, some $136 million in impounded funds on September 15, 1975.

[19] Perhaps Louisiana also would require the United States to account (as it has done) in respect of monies derived from State lands before the 1956 Agreement and not impounded, while denying its own obligation to account even for that period.

leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources described in paragraph 1 hereof;

(b) The United States shall render to the State of Louisiana and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the United States either by sale, leasing, licensing, exploitation or otherwise from or on account of the lands, minerals or resources described in paragraph 3 hereof;

(c) Within 60 days after receiving the account provided for by paragraph 6(a) or 6(b) hereof, a party may serve on the other and file with the Court its objections thereto. Thereafter either party may file such motion or motions at such time as may be appropriate to have the account settled in conjunction with the issues concerning the areas still in dispute. If neither party files such an objection within 60 days, then each party shall forthwith pay to any third person any amount shown by such accounts to be payable by it to such person, and the party whose obligation to the other party is shown by such accounts to be greater shall forthwith pay to the other party the net balance so shown to be due. If objections are filed but any undisputed net balance is shown which will be due from one party to the other party or to any third person regardless of what may be the ultimate ruling on the objections, the party so shown to be under any such obligation shall forthwith pay each such undisputed balance to the other party or other person so shown to be entitled thereto. The payments directed by paragraphs

> 5(a) and 5(b) hereof shall be made irrespective of the accountings provided for by paragraphs 6(a) and 6(b).

In light of paragraph 5 dealing with impounded funds, it is obvious that the reference in paragraph 6(a) to "all *other* sums of money derived by the State of Louisiana since June 5, 1950" from federal lands encompasses, and since 1956 reaches only, Zone 1 revenues. Thus far, at least, the State has not claimed otherwise. Instead, Louisiana has suggested that the Zone 1 accounting required by paragraph 6(a) is "for information only," that actual payment or offset under paragraph 6(c) is subject to "objection," and that paragraph 13, reserving rights under the Interim Agreement, effectively cancels paragraph 6 insofar as it runs against the State. Although the Special Master has apparently accepted this explanation (Report 18),[20] we must own that these responses surpass all previous examples of Louisiana's unabashed advocacy.

Paragraph 6(c) speaks of "objections" to the adequacy or correctness of the account filed by the other party. It does not contemplate an objection to accounting at all by the party required to do so, or an objection to payment of the amounts reported, except as it is claimed to be offset by monies due from the other party. As for paragraph 13, it expressly preserves "rights and obligations" under the Interim Agreement only insofar as they are "not inconsistent

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[20] At the cited page, the Report quotes from paragraph 6, but inadvertently attributes the language to "Paragraph 7."

with this Decree." [21] But, more fundamentally, it was plain nonsense to require an accounting with respect to Zone 1 if, since two decades earlier, the Interim Agreement had forgiven all payments in respect of that area. It is perfectly obvious that those who submitted the June 1975 Decree—not to mention the Court itself—believed the accounting provided for by paragraph 6(a) did not impose a pointless burden, but, rather, carried out the continuing obligation of the State to pay over to the United States, subject only to offsets, monies collected from federal lands, whether in Zone 1 or elsewhere.

We do not plead *res judicata* or estoppel. But we do suggest great caution in accepting a submission that contradicts the repeatedly expressed understanding of both parties and of the Court for two decades after the execution of the Agreement invoked in support. Only the strongest showing would justify upsetting formal decrees and explicit concessions in order to vindicate a new argument interposed on the eve of the day of reckoning. Louisiana has not remotely satisfied that burden here.

Nor is there any hardship in adhering to the rule that has governed the litigation from the outset. Un-

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[21] In relevant part, paragraph 13 provides:

> Nor shall anything in this Decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this Decree, between the parties or between a party and a third party, especially, but not limited to, the Interim Agreement of October 12, 1956, as amended, which Agreement remains in effect except as explicitly modified hereby.

less the State was deceiving us and the Court, it must have anticipated—at least until mid-1975—a potential liability for receipts from areas claimed by the United States. Offsets, fixed by 1956 and not thereafter increasing,[22] would reduce the debt by some $5 million. But, as time passed, it became increasingly probable that the State's indebtedness would exceed that amount. Yet, the net balance now due is a modest sum compared to the amounts already paid to the State from the monies impounded in the federal Treasury—some $34 million in 1966, some $136 million in late 1975. Although we were not permitted to withhold from these payments the amounts now due by Louisiana, nothing prevented the State itself from "putting by" a sufficient part of those large sums for the day that has finally arrived.

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[22] With only trivial exceptions (totalling less than $5,000), the United States impounded all revenues from areas potentially within State ownership collected after the execution of the Interim Agreement in October 1956, and, indeed, impounded substantial sums collected before that date. After 1956, the only mineral revenues of importance collected by the United States off the Louisiana coast and not impounded were from Zone 4, no part of which was, or was ever seriously expected to be, adjudicated to the State. See *Accounting by the United States as Required by Paragraph 6(b) of the Decree of June 16, 1975* (Aug. 1975), at 7-30. Since, under paragraph 14 of the 1956 Agreement (App. *infra*, 22a) impounded funds could not be offset against unimpounded monies due, it was clear, as of 1956, that the only offsets that would ever be available to reduce Louisiana's unimpounded liability to the United States were the unimpounded sums the Department of the Interior had by then collected from State lands.

Louisiana can hardly complain that, having enjoyed for many years what were properly federal revenues, it is now asked to make repayment in depreciated dollars, without interest. There would be no harshness in that result even if, because of its own improvidence, it were now necessary to appropriate fresh monies in order to satisfy the debt. But, as it happens, that will not be necessary. As we have disclosed to the State—although the accounting is not yet due (see para. 7 of the Decree of June 16, 1975, 422 U.S. at 16-17)—accummulated impounded receipts attributable to State lands from "split leases" exceed the sum we claim from Louisiana. While paragraph 6(c) of the 1975 Decree requires the State to pay over the net balance resulting from the unimpounded fund accountings as soon as objections are disposed of—without offsetting any impounded monies—we are content to defer Louisiana's payment until the split lease impounded fund accounting is settled and to waive the benefit of the "no offset" provision if the State will do likewise. The upshot would be that Louisiana need make no call on its own treasury.[23]

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[23] To avoid any misunderstanding, leading to further litigation, we now detail the precise effect of sustaining our objections to Louisiana's accountings.

(1) We assert that Louisiana is presently indebted to the United States in the following amounts disclosed in the document filed with the Special Master in August 1978 entitled

CONCLUSION

For the reasons stated, the foregoing exception of the United States to the Special Master's Report should be sustained and the State of Louisiana should be directed promptly to account for, and pay over to

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Composite and Summary of Significance of Accounting Data from Prior Louisiana Accountings:

In respect of Exhibit A thereof	$ 1,509,367.26
In respect of Exhibit B thereof	822,129.16
In respect of Exhibit I(A) thereof	1,977,655.01
In respect of Exhibit II thereof	2,794,232.91
In respect of Exhibit III thereof	11,854,339.49
Total	$18,957,723.83

(2) We admit that the amounts reported in the consolidated *Accounting of the United States as Required by the Decree of June 16, 1975* filed with the Special Master in August 1978 as unimpounded monies received by the United States from Louisiana submerged lands is a proper offset against the indebtedness recited above.

Total ..... $ 5,424,536.07

(3) Thus, the net balance due and payable by the State to the United States under paragraph 6 of the Decree of June 16, 1975 is:

$13,533,187.76

(4) Notwithstanding the provisions of the 1975 Decree, the United States would, if the State agrees, defer payment of this balance and offset this amount against the larger sum that will be due to the State from the impounded fund when the impounded split lease accounting is settled.

(5) In addition to the net balance recited in paragraph (3) above, the State will be required to account for and pay over to the United States, in due course, any monies collected by the State after June 16, 1975 and not yet included in any filed account that falls within the categories of the August 1978 accounting specified in paragraph (1) above.

the United States, subject only to offsets reflected in the final unimpounded accounting of the United States,[24] all monies, other than severance taxes and administration fees, collected by it since June 5, 1950, and derived from or attributable to submerged lands now adjudicated to the United States.

Respectfully submitted.

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NOVEMBER 1979

[24] But see the conditioned offer of postponement and further offset, *supra*, p. 40.

APPENDIX

AGREEMENT BETWEEN UNITED STATES OF AMERICA AND STATE OF LOUISIANA PURSUANT TO SECTION 7 OF THE OUTER CONTINENTAL SHELF LANDS ACT AND ACT 38 OF THE LOUISIANA LEGISLATURE OF 1956

WHEREAS, there is a controversy between the United States of America, hereinafter referred to as the United States, and the State of Louisiana, hereinafter referred to as the State, as to whether certain submerged lands in the Gulf of Mexico are owned by the State of Louisiana or whether such submerged lands are owned by the United States; and

WHEREAS, on June 11, 1956, the Supreme Court of the United States issued an order in the case entitled *United States of America* v. *State of Louisiana*, Original No. 15, October Term 1955, which provided among other things as follows:

> "It is further ordered that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed tidelands area pending further order of this court unless by agreement of the parties filed here."

and,

WHEREAS, Section 7 of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462), hereinafter referred to as the Act, authorizes the Secretary of the Interior, with the concurrence of the Attorney General of the United States, to negotiate

and enter into agreements with the States respecting operations under existing mineral leases and payment and impounding of rents, royalties and other sums payable thereunder, and respecting the issuance or non-issuance of new mineral leases pending the settlement or adjudication of the controversy; and

WHEREAS, the State of Louisiana, in Act 38 of the Louisiana Legislature of 1956, in recognition of the existence of the aforesaid controversy and of the said action of the Supreme Court of the United States, confers authority on the State Mineral Board, with the concurrence of the Attorney General of Louisiana, to negotiate and enter into agreements or stipulations for and on behalf of the State with the United States, respecting operations under any present or future mineral leases on the area in controversy, or the deposit in escrow or impounding of bonuses, rents, royalties and other sums payable thereunder pending the settlement or adjudication of the controversy; said act also providing for the ratification by the State of Louisiana of any mineral lease covered by any agreement entered into pursuant to its provisions, subject to compliance with its requirements; and

WHEREAS, the parties hereto agree that it is to the best interest of the United States and the State of Louisiana that the drilling of new wells be commenced and that, in certain instances, provision for leasing be made in the disputed area; and

WHEREAS, the United States of America and the State of Louisiana desire to provide for the impound-

ment of certain bonuses, rentals, royalties and other sums heretofore or hereafter payable under mineral leases in the disputed area, pending the final settlement or adjudication of the said controversy, and thereafter for the validation or recognition of outstanding leases issued by either party,

NOW, THEREFORE, the United States of America and the State of Louisiana, by and through the Secretary of the Interior and the State Mineral Board, respectively, and with the concurrence of the Attorneys General of the United States and of the State of Louisiana, stipulate and agree as follows:

1.

No definition, agreement or provision hereof shall be construed to waive or prejudice in any way any right or claim which either party now has or may hereafter be determined to have in and to any or all of the area referred to herein as the area in dispute, nor shall any provision hereof be the basis for questioning, prejudicing or waiving in any manner any right, interest, claim or demand whatsoever of either party now pending in the proceedings above referred to, or otherwise; and as to the State of Louisiana, nothing herein contained shall be construed in any manner as affecting the claim of the State of Louisiana to its historic boundaries as redefined in Act 33 of the Louisiana Legislature of 1954, or as otherwise fixed or defined, or the claim of the State of Louisiana to property and mineral rights within its historic boundaries.

2.

The submerged lands in the Gulf of Mexico are divided for the purposes hereof into four zones as shown on the plat annexed hereto as Exhibit "A", which reflects as a base line the so-called "Chapman-Line". No inference or conclusion of fact or law from the said use of the so-called "Chapman-Line" or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto or of any third party. It is recognized that the so-called "Chapman-Line" has not been actually surveyed and that while the limits of each zone as reflected on the announced Exhibit "A" shall be binding upon the parties for the purposes hereof, said specific limits remain to be finally fixed and determined either by agreement of the parties or otherwise. The aforesaid zones are as follows:

(a) Zone No. 1 comprises the area lying seaward of and within three (3) geographical miles of the so-called "Chapman-Line".

(b) Zone No. 2 comprises the area which is bounded landward by the seaward boundary of Zone No. 1 and which is bounded seaward by a line three (3) Marine Leagues from the so-called "Chapman-Line".

(c) Zone No. 3 comprises the area bounded landward by the seaward boundary of Zone No. 2 and bounded seaward by the seaward boundary line of the State of Louisiana as fixed and redefined by Act 33 of the Louisiana Legislature of 1954.

(d) Zone No. 4 comprises all that portion of the Continental Shelf lying seaward from the seaward line of Zone No. 3.

3.

Notwithstanding the existence of a dispute or controversy as to any other area, the disputed area as hereinafter referred to, sometimes referred to as the disputed tidelands area, or the area affected by the aforesaid controversy, is defined, for the purposes of this agreement, to be the area comprising Zones 2 and 3, as above defined and shown on the Exhibit "A".

4.

As to any leases heretofore granted by either party, this agreement shall be applicable only to any oil, gas or other mineral lease which was on June 11, 1956, and is on the effective date hereof in full force and effect, either by virtue of its terms or as the result of a suspension or extension as hereinafter referred to in Paragraph 11(b)(1) and (3), either as to the United States, the State, or both, as to oil, gas or other minerals, insofar as any such lease relates to lands within the disputed area. This agreement shall also be applicable to any lease as to which, on the effective date hereof, all requirements for the validation thereof under Section 6 of the Act have been complied with, but which has not yet been validated under said Section 6.

5.

The United States and the State of Louisiana hereby consent to the drilling of new wells in the disputed

area on any lease or part thereof to which this agreement is applicable, by the lessee or approved operator of such leases, provided that the lessee shall have complied with the following requirements:

(a) Such lessee shall have executed the waiver and consent agreement annexed hereto as Exhibit "B", in which it shall waive (under certain conditions set forth therein) as to such lease or part thereof, any claim based on ownership of the leased area by the State of Louisiana to a refund of any sums impounded by the United States under Paragraph 7 hereof, which it has or may have during the life of this agreement against the United States under Section 10 of the Act, or under any agreement entered into under Section 7 of the Act, and in which such lessee consents to the provisions of this agreement with respect to the impoundment and release of impounded funds.

(b) Such lessee shall also have entered into a separate agreement with the State of Louisiana on one of the six forms annexed hereto as Exhibits "C", "D", "E", "F", "G" and "H". Exhibit "C" is applicable to any producing lease or lease containing shut-in wells granted originally by the State and validated under Section 6 of the Act. Exhibit "D" is applicable to any of the same type of producing and shut-in well leases granted by the United States under Section 8 of the Act. Exhibit "E" is applicable to any non-productive lease granted originally by the State of Louisiana and validated under Section 6 of the Act. Exhibit "F" is applicable to any non-

productive lease granted originally by the United States under Section 8 of the Act. Exhibit "G" is applicable to any of the leases granted by the State since May 22, 1953. Exhibit "H" is applicable to any lease granted originally by the State of Louisiana under which payments have been made both to the United States and the State of Louisiana, so as to maintain the lease in effect as to both parties. If there is a need for variation to meet a factual situation relating to any lease which, in the opinion of both the State of Louisiana and the lessee, requires the insertion of special provisions in the form of agreement otherwise applicable to said lease, such special provisions may be inserted in said agreement by mutual consent of the State and the lessee; provided that said agreement otherwise incorporates the same basic requirements of the lessee. As to the leases affected by the two unitization agreements specifically listed in paragraph 12(b) and as to the leases affected by the agreements referred to in paragraph 11(b)(3), the form of agreement otherwise applicable to such leases shall be amended so as to refer specifically to such agreement and give recognition thereto.

The waiver and consent agreement and executed copies of the separate agreement with the State of Louisiana shall be filed in duplicate with the United States Oil and Gas Supervisor, United States Geological Survey, in New Orleans, Louisiana, and in duplicate with the Secretary of the State Mineral Board, State Capitol, Baton Rouge, Louisiana; and upon such

filing, the consent to drill herein granted shall, without further action by any of the parties be effective. However, the consent to the drilling of new wells contained in this Paragraph 5 shall not relieve any lessee of the obligation to comply with all regulatory provisions relating to drilling and production.

The drilling of any wells on a unitized area will not be permitted until the waiver and consent agreement and a separate agreement with the State, as hereinabove provided for, shall have been executed by the lessee for each lease committed to that unit.

6.

Notwithstanding any adverse claims by the other party hereto, the State of Louisiana as to any area in Zone No. 1, and the United States as to any area in Zone No. 4, shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party.

7.

(a) Subject to the exclusions of subparagraph (d) hereof, the United States agrees to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties and other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3, being the disputed area, if, as and when each such lease is made subject to the provisions of this agreement by the lessee thereof complying with the provisions of Paragraph 5 hereof.

(b) The State of Louisiana, since May 22, 1953, has granted certain mineral leases which affect submerged lands located in the disputed area. The parties take cognizance that, under the laws of the State of Louisiana, the State of Louisiana cannot impound sums heretofore paid to it with respect to such leases. Accordingly, in order that any lessee desirous of obtaining consent for the drilling of a well on any such lease may satisfy the requirement of the United States that such payments be impounded, the State of Louisiana agrees, with respect to any such lease, and as provided in Exhibit G hereof, (1) to require of any lessee seeking a drilling permit to drill any portion of the leased premises lying within the disputed area to deposit in a separate fund for impoundment in the Treasury of the State of Louisiana a sum equal to all bonuses, rentals, royalties and other payments applicable to the disputed area theretofore paid to the State by the lessee, and to hold the amount so deposited as an impounded fund in its treasury, subject to the provisions hereof, and (2) to impound all payments hereafter received by it from the lessees of any of the said leases issued by the State in the disputed area since May 22, 1953, which are made subject to this agreement.

(c) As to any lease granted originally by the State of Louisiana under which payments have been made both to the United States and the State of Louisiana, so as to maintain the lease in effect as to both parties, it is agreed that (a) as to any such lease which is not now producing oil, gas or other minerals, lessee shall

be required to continue, until further agreement of the parties, or until the final settlement or adjudication of the controversy, to make such dual rental payments, including payments based on shut-in wells; but in the event production of minerals is commenced, lessee shall deposit single royalty payments based upon such production for impoundment as provided for in sub-paragraph (e) hereof; (b) with respect to any well or wells now producing minerals from any such lease with respect to which royalty has been paid both to the State of Louisiana and to the United States, the lessee shall be required to continue, until further agreement of the parties, or until final settlement or adjudication of the controversy, to make such dual royalty payments under the terms of the applicable leases, subject to the provisions of any applicable agreement heretofore entered into between such lessee and the State of Louisiana, or between such lessee and the United States. No such royalty paid to the State of Louisiana on oil, gas and other minerals produced from any such well shall be subject to impoundment as herein provided for. However, in the event production is obtained from any additional well or wells which are not now producing minerals, single royalty payments based upon the production from any such well or wells shall be deposited for impoundment as provided for in subparagraph (e) hereof.

(d) There shall be excluded from the obligations of the parties in this paragraph 7 to impound separately (1) the dual rental payments, including pay-

ments based on shut-in wells, and dual royalty payments referred to in sub-paragraph (c) hereof, made under any lease, including such dual payments made under any agreement entered into under Section 7 of the Act, and (2) any rentals paid to the United States for that portion of the submerged lands affected by any lease granted originally by and valid as to the State of Louisiana extending into the disputed area when production is being obtained from that portion of the leased premises lying in Zone No. 1.

(e) All sums subject to impoundment which are payable hereafter under the terms of the leases granted by the State of Louisiana, as referred to in sub-paragraph (b) hereof, shall be paid by the lessee to the State of Louisiana for impoundment as hereinabove provided. All sums subject to impoundment which may hereafter be payable by any lessee under the terms of any other lease made subject to the provisions hereof shall be paid by the lessee to the United States for impoundment as herein provided for.

Such payments to the State of Louisiana shall be made to the Register, State Land Office, or the official or agency then designated by Louisiana law to receive such payments, and deposited in a separate fund for impoundment in the Treasury of the State of Louisiana.

Such payments to the United States shall be made to the Oil and Gas Supervisor, United States Geological Survey, New Orleans, Louisiana, or the official or agency then designated by the law of the United

States to receive such payments, for impoundment in a separate fund in the Treasury of the United States.

(f) In the event that only a part of a lease is within the disputed area, the sums to be impounded under this paragraph 7 shall be determined on a pro-rata basis as hereinafter provided for in Paragraph 10.

(g) The United States and the State of Louisiana agree that all such payments made pursuant to subparagraph (e) above, if otherwise made in accordance with the provisions of each such lease and this agreement, shall, subject to the provisions of Paragraph 11(a) hereof, be considered as payments in compliance with the lease affected.

8.

Each of the portions, promptly after the effective date hereof, and in any event within 90 days from such effective date, shall furnish to the other party a statement of all sums which are subject to impoundment by each party under the terms hereof. Such statement shall be made separately with respect to each lease or portion thereof within the disputed area and shall reflect the amounts theretofore received and the nature and source of the funds so received. Thereafter the parties shall cooperate in making available to each other on a monthly basis a statement with respect to each such lease, so that each party shall have a current record of the amounts received with respect to each such lease and the nature and source thereof.

9.

Except as to claims under Section 10 of the Act with respect to sums which would not be due to the State of Louisiana even if the question of ownership of the leased land is determined in the State's favor, the impounded funds provided for herein shall be held intact, in a separate account for each lease or portion thereof affected, by each party until title to the area affected is determined. Whereupon, except as otherwise herein provided:

(a) Any funds derived from an area finally determined to be the property of the United States shall be taken from the separate and impounded fund in the Treasury of Louisiana provided for herein and paid to and received in the Treasury of the United States as provided by law.

(b) Any funds derived from an area finally determined to be owned by the State of Louisiana (except the funds referred to in subparagraph (c) hereof) shall be taken from the separate and impounded fund in the Treasury of the United States provided for herein, paid to the Register, State Land Office, State of Louisiana, or the official or agency then designated by Louisiana law to receive such payments, and shall thereafter be received in the Treasury of the State of Louisiana, as provided by law.

If, with respect to any lease, the lessee shall have paid the State of Louisiana all or any part of the amount of the impounded fund, prior to the payment of such impounded fund to the State of Louisiana by the United States, the amount of such pay-

ment so made by the lessee shall not be paid to the State, but shall be subject to the provisions of subparagraph (d) hereof.

(c) Any funds representing additional royalty paid to the United States under Section 6(a)(9) of the Act which are impounded pursuant to Paragraph 7(a) hereof, shall, on determination that such funds are derived from an area determined to be owned by the State of Louisiana, be taken from the separate and impounded fund in the Treasury of the United States provided for herein and paid to the Collector of Revenue of the State of Louisiana, or the official or agency then designated by Louisiana law to receive such payments, and shall be credited by the State only against taxes which may be due and payable and not theretofore paid to the State under the terms of the agreement between the State and the lessee of such lease or leases from which such funds were derived; and any of such funds in excess of the credit required to make the State whole in respect to such taxes shall be released by the State to such lessee or lessees.

(d) In these cases (1) where the lessees have not complied with Paragraph 5 of this agreement, or (2) where dual payments have been made both to the United States and the State of Louisiana, including such dual payments made under any agreement entered into under Section 7 of the Act, or (3) where the lessee shall have made payments to the State of Louisiana under any lease of all or any part of the impounded funds prior to the time that the im-

pounded funds are paid by the United States to the State of Louisiana, or (4) where rentals have been paid to the United States during the period that production is being obtained on that part of the same lease granted by and valid as to the State of Louisiana, and lying in Zone No. 1, or (5) finally as to any lease or part thereof determined to be owned by the United States, where sums have been paid for impoundment in excess of the amount that lessee was lawfully required to pay under such lease, refunds, if any, from the United States shall be made to the lessees pursuant to applicable law.

(e) Payments of impounded funds hereunder shall be made in full within seventy-five (75) days after the date of the applicable determination, unless by agreement of the parties a later date is specified.

(f) The provisions of this paragraph shall apply separately to each lease or that portion thereof in the disputed area.

10.

In the event only a portion of the area affected by any lease lies within the disputed area, then until the final settlement or adjudication of the controversy, all sums which are to be impounded by any party under the terms hereof shall be pro-rated on an acreage basis as to bonuses and rentals; and as to royalties, the amount shall be computed by attributing to the area in dispute royalties from each well bottomed under the area in dispute. If, however, in connection with royalty payments, any well or wells are bottomed under a unit theretofore validly estab-

lished which includes submerged lands lying within the area of dispute, the royalty from such well or wells shall be allocated to each lease or portion thereof lying within the area of dispute, in the proportion that the number of acres covered by such lease and participating in the production from any such well or wells, in accordance with the terms of the unit agreement, bears to the total number of acres so participating in such production.

However, as to the unit for oil and gas dated October 27, 1954, approved December 22, 1954, of which Continental Oil Company is the operator, comprising 51,579.78 acres, including Blocks 38 through 41, 46 through 49, 51, 52, and the west half of 53 in the Grand Isle area, and the unit for oil and gas dated November 21, 1955, approved January 16, 1956, of which Continental Oil Company is the operator, comprising 27,997.605 acres, including Blocks 42, 43, the north half of 44, the south half of 32, 69, 70, the south half of 67, and the south half of 68, in the West Delta-Grand Isle area, until such time as the United States and the State shall agree on another method of allocation, the allocation provisions of the two said unit agreements shall be disregarded, and there shall be attributed to each lease or portion thereof in the disputed area the royalties from the well or wells bottomed under such lease or portion thereof.

In the event of a final determination that either party hereto owns only a portion of the area affected by any lease or leases, the impounded funds shall be pro-rated on the same basis as just hereinabove provided for, and payments shall be made accordingly.

11.

(a) Upon the final settlement or adjudication of the aforesaid controversy, as to any area affected by a lease or portion thereof to which this agreement is applicable, the successful party, upon receipt of the impounded funds, shall validate and give recognition to such lease or portion thereof, and shall grant to the lessee all of the rights authorized or provided for by the laws of the successful party. It is provided, however, that the ratification and validation of any lease by the State of Louisiana shall be subject to the full compliance by the lessee under said lease with Act 38 of the Louisiana Legislature of 1956, and shall be in accordance with and subject to compliance with the terms of the separate agreement to be made by such lessee with the State of Louisiana as herein provided for.

(b) Nothing herein contained shall obligate the United States or the State to recognize or give effect to any conventional agreement executed, or any order, determination or regulation issued by the other subsequent to June 11, 1956, amending, modifying, or otherwise changing any lease subject to the provisions of this agreement, except that the successful party in the controversy shall recognize and give effect to the following, even though subsequent to June 11, 1956:

(1) An agreement, order or determination recognizing that the running of the period during which any lease may be maintained in effect without drilling or producing operations or without payment of

shut-in rental or royalty on the basis of a well capable of producing oil, gas or other minerals, insofar as it relates to land affected by the aforesaid controversy, has been and shall be suspended during the period or periods of time that the right to drill has been enjoined by order of court;

(2) The pooling and unitization agreements as provided for and as described in paragraph 12(b) hereof;

(3) The suspension or extension of the necessity for producing from oil or gas wells, and the recognition of the continuance of the leases affected during such suspension or extension, provided such suspension or extension is on any one of the following bases: (a) An extension of the period formerly provided within which to make payments of shut-in gas rental or royalty; (b) The abutting in of a well when necessary or desirable for the prevention of waste, or as a matter of operational safety, such as during the drilling of another well from the same platform; (c) The abutting in of a well for such period or periods as may be reasonably necessary to permit installation of producing and transporting facilities; (d) Under Section 12 of the Act.

Neither party shall, without the consent of the other, enter into any agreement reducing rentals or royalties payable under any lease made subject to the terms hereof.

(c) Any lessee shall have the right to elect not to maintain in force and effect any lease brought under the terms hereof, but any such election or any

failure of a lessee to maintain a lease in effect shall not relieve that lessee of the obligation to pay to the State of Louisiana or to the United States, with respect to such lease, all bonuses, rentals, royalties and other considerations (and with respect to the State of Louisiana all licenses, taxes and fees) which have become due prior to the termination or forfeiture of said lease. Also, this agreement as between the United States and the State of Louisiana, shall continue in effect as to the payments made with respect to such lease.

(d) The provisions of this Paragraph 11 shall apply separately to each lease or that portion thereof in the disputed area.

12.

(a) The parties hereto agree to consult and cooperate with respect to the approval of pooling or drilling agreements relating to leases lying partly within and partly without the disputed area.

(d) It is agreed that, for the purpose of ratification and validation of each separate lease or portion thereof included therein, as provided for in Paragraph 11(a) above, any unit validly established by agreement of either party prior to June 11, 1956, shall be given effect in accordance with its terms and the law, regulation or order under which it was established; provided that neither this provision nor any other provision of this agreement, or of the unit agreement, shall limit the right of the party finally determined to own the area or portion thereof affected by such unit, if not the party by whom or with whose

consent such unit was established, from taking, subsequent to such final determination, such action with respect to any such unit as may be authorized by and consistent with its then laws or policies. Any lessee affected by such action shall be given a reasonable time within which to comply with the then laws or policies and to safeguard the terms of its lease. Notwithstanding their establishment subsequent to June 11, 1956, the provisions of this paragraph 12(b) shall also be applicable to the following described unitized areas and unit agreements in the same manner as though they had been established prior to June 11, 1956, same being all such which were approved subsequent to said date and prior to October 9, 1965:

1. The unit for oil and gas dated December 9, 1955, and approved June 29, 1956, of which Magnolia Petroleum Company is the operator, comprising 17,250 acres in the Ship Shoal Area, lying in Block 63, west half of 64, west half of 71, 72, east half of 73, and north half of 87.

2. The oil and gas unit dated May 25, 1956, which was approved on June 28, 1956, of which Kerr-McGee Oil Industries, Inc. is the operator, comprising 30,000 acres in the Ship Shoal Area lying in Blocks 27, 28, 29. 34, 35 and 36.

13.

No new leases shall be granted by either party in that part of the disputed area lying in Zone No. 2, except that when the Secretary of the Interior and the State Mineral Board of Louisiana shall jointly

determine new leases are necessary to prevent drainage of unleased lands, the Secretary of the Interior may grant such new leases which shall be subject to the terms of this agreement. Otherwise, the injunction against new leasing shall continue to be effective as to that area.

Beginning one year from the effective date hereof, the Secretary of the Interior, or his delegate, may grant new mineral leases in Zone No. 3, being the remainder of the disputed area.

All leasing pursuant to this Paragraph 13 shall be done by the Department of the Interior in accordance with and subject to its then regulations and practices under the Act, including the determination of when lease sales shall be held and what land shall be offered, the method of advertising, the date and time of the opening of bids, and the awarding, execution and form of leases, *Provided* that the minimum royalty, bonus and rental for any such lease shall not be less than the minimums provided in the proposed letting of May 15, 1956, and the maximum acreage in any lease and the term thereof shall be as provided for in said proposed letting; *Provided, further*, that there shall be a joint committee of six, three members of which shall be designated or appointed by the Secretary of the Interior or his delegate, and three members of which shall be designated or appointed by the State Mineral Board of the State of Louisiana, whose duties and functions shall relate solely to a consideration of adequacy of the bids. The Director of the Bureau of Land Management shall promptly furnish

to this committee full information as to all bids received, designating specifically these which he proposes to accept or reject. The committee shall accept the decision of the Director with respect to the bid or bids on any block, tract or portion thereof unless four members thereof shall cast an opposing vote in which case the decision of the committee shall prevail and the Director shall act in accordance with such recommendation. The committee shall be allowed no more than 10 days within which to consider and act on the information submitted to it.

All sums payable under the terms of any lease granted pursuant to this Paragraph 13 shall, notwithstanding any other provision of this agreement, be paid to the United States for impoundment and release as provided for in Paragraphs 7 and 9 above, and any such lease shall be subject to all of the terms and provisions of this agreement, including, but not limited to the consent to drill and the validation provisions hereof.

14.

Any sums required to be impounded by either party hereto, or to be paid over or released to the other party by any party hereto, shall be impounded, paid or released without reference to, limitation by, or effect against any claim against or liability or obligation of the other party, but nothing herein contained shall limit such right as either party may have to assert separately any other claim which it may have against the other party, or any third party.

This stipulation and agreement shall terminate as to any area, upon the final settlement or determination of the aforesaid controversy with respect to such area; and thereafter the successful party shall have exclusive jurisdiction and control over the area so determined to be owned by it to the extent fixed by the decision in the final adjudication. In the event of the final settlement or determination of the controversy, with respect to a part or parts of the disputed area, leaving another part or other parts still in dispute, this agreement shall be deemed to continue to apply to all areas still in dispute; and if the area still in dispute divides a lease now lying wholly within the disputed area, or divides a portion of a lease lying within the disputed area, this agreement shall continue to apply to that portion of such divided lease lying within the area still in dispute. It is provided, however, that notwithstanding the termination of this stipulation as to any area, the parties shall nevertheless comply with all of the provisions hereof relating to the payment or release of impounded funds and the validation or ratification of the lease or leases affected by such termination.

Upon the final settlement or adjudication of the controversy as to all of the submerged lands within the disputed area, this stipulation shall finally terminate, subject only to the release of payments and the validation and ratification requirements hereof.

Annexed hereto as Exhibits I and II, respectively, are certified copies of Act 38 of the Louisiana Legis-

lature of 1956 and Act 33 of the Louisiana Legislature of 1954, hereinabove referred to.

THUS MADE AND EXECUTED effective this 12th day of October, 1956.

UNITED STATES OF AMERICA

By (Sgd) Fred A. Seaton
Secretary of the Interior

Concurred in by:

(Sgd) Herbert Brownell, Jr.
Attorney General of the
United States
STATE MINERAL BOARD ON
BEHALF OF THE STATE OF
LOUISIANA

By (Sgd) William G. Helis, Jr.
Chairman

Concurred in by:

(Sgd) Jack P. F. Gremillion
Attorney General of the
State of Louisiana

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No. 9, Original

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,
Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FIRST ISSUE IN THE SUPPLEMENTAL REPORT OF THE SPECIAL MASTER FILED AUGUST 27, 1979 WITH BRIEF IN SUPPORT OF EXCEPTIONS AND MOTION FOR ORAL ARGUMENT

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GLOSSARY

1. "Exh." number and "LPI" number:

Louisiana introduced into evidence fourteen exhibits, identified as "La. Exh." (number). Each exhibit, except numbers 13 and 14, contained numerous documents identified by an "LPI" number, meaning "Louisiana Preliminary Identification" number. Hence, for example, a particular document will be identified as "La. Exh. 1-LPI 19."

2. "Tr." Number:

The page number of the transcript at which any quotations from the transcript are made will be identified by "Tr." followed by the page number, except as to the deposition of federal witness, George S. Swarth, which will be referred to for identification as "Dep. Tr." followed by the page number.

3. "Tidelands money":

The term "Tidelands money" will be used to mean the oil and gas revenues derived from the properties offshore Louisiana that are in dispute in this litigation and have been subject to impoundment pursuant to the Interim Agreement of October 12, 1956.

4. "Louisiana's money":

The term "Louisiana's money" will be used to mean Louisiana's share of the "Tidelands money" as shown by the accountings by the United States

filed pursuant to the Supplemental Decrees of this Court rendered on December 13, 1965 and on June 16, 1975 and the various pretrial orders of the Special Master.

5. "A." Number:

The Appendix is referred to by the letter A, followed by the item number and the page number on which the item appears, for example, A. 7 p. 3.

6. "Interim Agreement";

The "Agreement between United States of America and State of Louisiana pursuant to Section 7 of the Outer Continental Shelf Lands Act and Act 38 of the Louisiana Legislature of 1956," executed on October 12, 1956, as amended, is herein called the "Interim Agreement."

7. "Report":

The Special Master's Supplemental Report of August 27, 1979, is herein referred to as "Report."

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,
Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FIRST ISSUE IN THE SUPPLEMENTAL REPORT OF THE SPECIAL MASTER FILED AUGUST 27, 1979 AND MOTION FOR ORAL ARGUMENT

EXCEPTIONS

Pursuant to Order entered by this Court on October 1, 1979, receiving the Supplemental Report of August 27, 1979 by the Special Master in this cause and granting the parties 45 days within which to file exceptions, if any, the State of Louisiana, through its Attorney General, herewith files four exceptions to the determination made by the Special Master on the First Issue considered in his Supplemental Report.

All of the exceptions relate only to the First Issue which is entitled:

> "*First Issue* - Is the United States obligated to account for and pay to the State of Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds?"

Louisiana accepts and urges the approval of the Supplemental Report insofar as it relates to the other two issues discussed therein, which are entitled:

> "*Second Issue* - Does Louisiana have the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1?"

> "*Third Issue* - Does Louisiana have the obligation to account for unimpounded funds and to pay to the United States money collected by it as severance taxes on minerals removed from areas subsequently determined to belong to the United States?"

Louisiana's exceptions to the First Issue in the Report are as follows:

1. The State of Louisiana excepts to the failure of the Special Master to conclude that the Interim Agreement imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money.

2. The State of Louisiana excepts to the failure of the Special Master to conclude that the United States used Louisiana's money for its own purposes without compensation to Louisiana and without any authority under the Interim Agreement.

3. The State of Louisiana excepts to the failure of the Special Master to conclude that the United States had the duty to invest the Tidelands money for the benefit of both parties.

4. The State of Louisiana excepts to the conclusion of the Special Master that the equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are inappropriate to the situation here presented.

WHEREFORE, the State of Louisiana moves the Court to modify the Supplemental Report of the Special Master filed on August 27, 1979 as to the First Issue therein in accordance with the foregoing Exceptions, and refer this issue back to the Special Master for his determination and recommendation to this Court of the amount for which the United States should account and pay to Louisiana for the value of the use of Louisiana's money or for interest thereon, and the State of Louisiana moves the Court to approve the Supplemental Report as to the Second Issue and the Third Issue therein.

The State of Louisiana, through its Attorney General, further moves the Court, in view of the importance of this litigation to Louisiana, that this case be set for oral argument after all briefs have been filed.

In further response to said Order of October 1, 1979, Louisiana concurrently herewith files its brief and appendix thereto in support of the foregoing exceptions.

Respectfully submitted,

/s/ William J. Guste, Jr.

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No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,
Defendants.

BRIEF IN SUPPORT OF EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FIRST ISSUE IN THE SUPPLEMENTAL REPORT OF THE SPECIAL MASTER FILED AUGUST 27, 1979

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SUMMARY OF ARGUMENT

1. The argument in support of Exception 1 sets forth the pertinent evidence and law which conclusively establishes that the impoundment provisions of the Interim Agreement implied a trust which imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money. The principal basis for the trust is that it is implied from the impoundment provisions of the Interim Agreement which established an escrow arrangement, and it is well-settled law that money held in escrow is money held in trust. However, there are additional grounds for the establishment of the trust, independent of the escrow, which are based upon admissions of federal officials and documentary evidence, as well as the conduct and relationship of the parties. The Special Master erred in that he did not give consideration to the decisive evidence and law, and to his own findings in his Order on Louisiana's Motion for additional findings of facts, which proved the fiduciary relationship.

2. The argument in support of Exception 2 sets forth the admissions and evidence which establishes that the United States used Louisiana's money for its own purposes without compensation to Louisiana and without any authority under the Interim Agreement. It is admitted that the Tidelands money was deposited in the Federal Reserve Bank to the General Account of the Treasurer of the United States, where it was immediately available to meet any cash needs of the federal gov-

ernment whatsoever. It is also admitted that when the cash was deposited to the General Account of the Treasurer, a bookkeeping entry of an equal amount was made on a *deposit fund account* in the Treasury Department which is only a liability account. No cash was deposited in that account. In addition, an expert witness testified that Louisiana's money was actually used by the United States and documented the basis for his conclusion. The evidence also shows that there is no authority in the Interim Agreement for the United States to use Louisiana's money for its own purposes without compensation. The Report gives no valid reason for failing to conclude that the United States used Louisiana's money for its own purposes without authority. The Report misinterprets the provision in the Interim Agreement requiring the impounded funds to be "held intact in a separate account" in that it mistakenly assumes that a liability account is all that is required. The argument also points out that the assumption that Louisiana representatives accepted the procedure used in the California case for the handling of the money is not supported by the record.

3. The argument in support of Exception 3 presents the reasons why the Special Master should have concluded that the United States had the duty to invest the Tidelands money for the benefit of both parties. For the breach of this duty the United States is required to account to Louisiana for the amount of interest that would have accrued to the impounded fund if proper investment had been made. There are several

grounds upon which the obligation to invest is based and the Special Master erred in not giving predominance to any of them. The argument sets forth each of the several grounds upon which the duty to invest is based and discusses the response in the Report with respect to each ground. In addition, the argument points out that the June 16, 1975 Decree does not limit or adjudicate what need be accounted for, but it is to be determined by the Interim Agreement and applicable law.

4. The argument in support of Exception 4 deals with Louisiana's contention that the United States has been unjustly enriched by the use of Louisiana's money. The basis for the unjust enrichment is clearly shown by the evidence. Authorities are cited to show that the United States should be required to account for the value of the use of Louisiana's money under a constructive trust as an increment to the impounded fund, or by way of quasi contract, as an unimpounded personal obligation. The Report does not address the merits of this issue and cites no authorities to justify the denial of equitable relief. The Report simply states that the United States has not breached the terms of the Interim Agreement, which is not the issue.

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA, ET AL,

Defendants.

ARGUMENT IN SUPPORT OF EXCEPTIONS

INTRODUCTORY STATEMENT

Back in 1956, and for some time prior thereto, the United States had been holding lease sales and issuing oil and gas leases covering the area claimed by Louisiana. In order to try to stop this activity, Louisiana filed suit in the state court to enjoin a federal lease sale set for May of 1956. Whereupon the United States filed a motion in No. 15, Original to enjoin the State of Louisiana from proceeding with its efforts to stop the proposed federal lease sale in the disputed area offshore Louisiana. Tr. 33, 34, 35, 36, 66, A. 1, 2, 3, 4, 5, 6, 7 pp. 1, 2, 3. As a result of the motion filed by the United States, this Court issued an order on June 11, 1956 which provided:

> "It is further ordered that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed Tidelands area pending further order of this Court unless by agreement of the parties filed here." La. Exh. 1-LPI 1; Tr. 23 A. 6 p. 2.

This led to the execution of the Interim Agreement of October 12, 1956. Tr. 36. The virtual shutdown of oil and gas operations offshore Louisiana by this injunction caused economic chaos in southern Louisiana and put great pressure on the Louisiana negotiators to enter into an agreement to lift the injunction. La. Exh. 1-LPI 13, Tr. 108-112, A. 8, 9, p. 4. Request No. 8 in Louisiana's Motion for Additional Findings of Fact stated:

> "8. Enjoining the drilling and leasing for oil and gas off the coast of Louisiana had a severe economic impact on the coastal parishes of Louisiana. Under these circumstances, the Interim Agreement of October 12, 1956 was entered into to permit the United States and Louisiana to resume the drilling and leasing for oil and gas in the Gulf of Mexico off the coast of Louisiana. (See preamble to La. Act 38 of 1956, La. Exh. I-LPI No. 3; Tr. 108-112; Tr. 158; Tr. 112-117)"

In denying this request as immaterial, the Special Master stated:

> "Request No. 8 correctly states the facts . . ."

As a consequence of the Interim Agreement, the Tidelands money was delivered to the Treasury of the United States to hold under the impoundment provisions of the agreement. The relevant impoundment provisions are as follows:

The preliminary "whereas" clause in the Interim Agreement recited the authority of the State Mineral Board, with the concurrence of the Attorney General of Louisiana, under Act 38 of the Louisiana Legislature of 1956

> ". . .to negotiate and enter into agreements or stipulations for and on behalf of the State with the United States, respecting . . .*the deposit in escrow or impounding* of bonuses, rents, royalties and other sums payable thereunder pending settlement or adjudication of the controversy . . ." (Emphasis added.) A. 10, 11, 13, pp. 6, 9.

Paragraph 7(a) of the Interim Agreement provides:

> "[T]he United States agrees to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties and other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, . . ." in the disputed area.

Paragraph 7(e) provides that the Oil and Gas Supervisor, United States Geological Survey, New Orleans, Louisiana, or the official or agency designated by the United States shall receive such payments "for impoundment in a separate fund in the Treasury of the United States."

Paragraph 8 requires that the holder of the funds render a monthly statement which shall reflect the amount received from each lease and the nature and source of the funds.

Paragraph 9 provides:

> ". . .The impounded funds provided for herein shall be *held intact,* in a *separate account* for each lease or portion thereof affected, by each party until title of the area affected is determined." (Emphasis added.)

Paragraph 9(b) provides that any *funds* derived from an area finally determined to be owned by the State of Louisiana "shall be *taken from* the separate and impounded fund in the Treasury of the United States" and paid to Louisiana.

The Report at the outset states that "indisputably the Interim Agreement does not specifically provide for the payment of interest . . ." and then sets forth Louisiana's position to be as follows:

> "The State of Louisiana argues, however, that the term 'impounded' necessarily implies an obligation of the part of the holder of the funds to pay interest thereon." Report 5.

But that is not what Louisiana contends. The Special Master has apparently misconstrued Louisiana's position to be that the word "impounded" implies an intention to let the United States hold the money with the right to do with it as it pleases, provided that it pays interest to Louisiana in addition to the principal amount ultimately determined to be due. But that assumes that Louisiana agrees that the impoundment provisions of the Interim Agreement are tantamount to a loan of money and would constitute a debt and Louisiana's claim is only for interest. In the interpretation of the Interim Agreement, there is a big difference between the obligation to pay interest on the impounded fund as a debt, and the obligation of a trustee to invest the trust funds and account to the beneficiary for the proceeds of the

investment. 1 A. Scott, Law of Trusts §12.2 at 108 (2d ed. 1956), A. 12 p. 6. This misconception of Louisiana's position permeates the Report and is a basic fallacy in the conclusion.

Louisiana contends that for the failure to comply with its fiduciary duty, the trustee must account to the beneficiary for the amount of interest that would have accrued under proper investment. In that sense only, does Louisiana claim interest. Louisiana has never contended that it loaned its money to the United States and seeks interest on a debt. The Louisiana negotiators had no authority to loan the state's money and certainly did not intend to do so.

Louisiana's true position is based on two alternative grounds. The first ground deals with the duty of the United States, as a trustee, to invest the Tidelands money and for the failure to do so, to account to Louisiana for its share of the amount that would have accrued to the impounded fund if proper investment had been made. This is implied from all of the impoundment provisions of the Interim Agreement, not just the word "impound," and from the application of the law. The breach of the fiduciary duty of the United States in its refusal to honor Louisiana's request to invest the Tidelands money, and the failure to follow a federal statute requiring investment are also within the scope of this ground.

The second ground deals with the unjust enrichment of the United States at the expense of Louisiana by the use of Louisiana's money for fed-

eral governmental purposes without compensation to Louisiana. In order to prevent this unjust enrichment, the United States is obligated to account to Louisiana, as a matter of law, independent of the Interim Agreement, either upon the basis of a constructive trust or quasi contract, for the amount of the value to the United States of its use of Louisiana's money.

EXCEPTION 1

Louisiana excepts to the failure of the Special Master to find that the Interim Agreement imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money.

The impoundment provisions of the Interim Agreement implied a trust which imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money. The trust which established the fiduciary relationship is implied in fact from the intent of the Interim Agreement.

All text writers agree that no particular form of words is necessary for the manifestation of the intention to create a trust. A trust can be created without using the word "trust" or "trustee." Implied trusts arise when the whole transaction and the words used imply or infer that it was the intention to create a trust. 1 A. Scott, Law of Trusts, §24, at 192 (3rd. ed. 1967); Restatement (Second) of Trusts, Vol. 1, §24 (1959); 1 J. Perry, Trusts §112 at 144 (7th ed. 1929).

The impoundment provisions of the Interim Agreement evidence the intent that the Tidelands money is to be held in escrow. Paragraphs 7(a) and 9 of the Interim Agreement, when read together, provide that the Tidelands money shall be impounded in a separate fund in the Treasury of the United States and held intact in separate account for each lease or portion thereof affected. These provisions, along with the other impoundment provisions, and the attached Exhibits, manifest the intent to establish an escrow.

The Report concludes that there is an ambiguity as to the meaning of the term "impounded" as used in the Interim Agreement. Report 6. If this means that the term "impoundment" does not mean escrow, we disagree. It is permissible to offer extrinsic evidence in the interpretation of contracts, even when the contract is free from ambiguity. This "concedes the supremacy of the writing and merely seeks to illuminate its meaning." McCormick on Law of Evidence, Ch. 24, p. 442; Corbin on Contracts, Vol. 3 §539.

Accordingly, Louisiana introduced testimony to show that the terms "impoundment" and "escrow" were used interchangeably throughout the negotiations. Tr. 40, 49, 128, 161, A. 14, p. 9. This was not objected to by the federal negotiators, nor is it now denied.

But even if the term "impoundment" is ambiguous, the intent that the Tidelands money was to be held in escrow is established by the repeated representations and admissions of the escrow relationship made by the federal negotiators and officials, before the commencement of the negotiations, during the course of the negotiations, and continuously after the execution of the Interim Agreement up to the trial of this case. La. Exh. I-LPI 40, LPI 39, LPI 38, Tr. 49-54, 162; La. Exh. I-LPI 21, LPI 22, Tr. 206; La. Exh. I-LPI 19, LPI 20, LPI 45, LPI 23, Tr. 198, 208, 210, 444, 463-464.

The Report states that "both parties used the term 'escrow' rather freely and loosely." Report 7. But the record is clear that the parties understood

and meant what they said when they used the term "escrow." For example, in June of 1956, before the commencement of the negotiations for the Interim Agreement, there was filed in No. 15, Original (the proceedings leading to the Interim Agreement) a Memorandum for the United States on Maintenance of Status Quo which contained the following representation:

> "The United States stands ready and willing to enter into an agreement with Louisiana to hold all proceeds of leasing in the disputed area in *escrow* pending a determination of the case on its merits." (Emphasis added.) Tr. 49-50, A. 15 p. 9.

As further proof that the parties intended an escrow arrangement, the record shows that at the first meeting with the federal negotiators on July 2-3, 1956, Louisiana proposed a "Stipulation" providing for a third party escrow agent. Tr. 40-46, 158-159, La. Exh. I-LPI 5, A. 16 p. 10. But that proposal was rejected by the federal negotiators and they, in turn, proposed that the money be held by the United States in a "single escrow fund." La. Exh. I-LPI 6; Tr. 121-123; A. 17, 18, pp. 10, 11. Louisiana acceded to the demands of the United States to act as escrow holder because of the enormous political pressures, but with the understanding that the obligations of an escrow holder would be the same for the United States as with a third party escrow agent, and there would only be a change of depository. Tr. 47-48, 162-163. The Louisiana witness testified:

"Q. Is it a fact, Mr. Carmouche, that one of the reasons that you agreed to the change of the proposal that the money be held by a third party escrow agent to the United States was due to the fact that you thought there would only be a change of depository?

"A. Yes, We were assured of that." Tr. 48, A. 19, 20 pp. 11, 12.

This testimony was not contradicted. But the Report states that if the funds were to be handled identically in either case there would seem to be little point in the insistence that the United States act as escrow agent, and furthermore, the federal negotiators had no specific authority to enter into a third party escrow agreement. Report 7. The United States offered no testimony on this point. Whatever may have been their motive, this evidence shows that the federal negotiators assured Louisiana that the obligations of the United States would be the same as a third party escrow agent, and no question of authority was ever raised.

Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly confirmed by federal officials. A. 21, 22, 23 pp. 13-17.

Having determined that the term "impounded" was ambiguous, the Report shows that the Special Master only considered facts at the time the agreement was entered into to determine the meaning of the agreement. Report 6. He should also have considered how the parties had subsequently interpreted the agreement. *Godfrey v. Unit-*

ed States Casualty Company, 167 F. Supp. 783 (1958) citing Wigmore on Evidence, Vol. IX, §2470, p. 227; *Moreau v. Otis Elevator Co.*, 531 F. 2d 311 (1976).

It is well-established law that money held in escrow is money held in trust. There is no question about this. Exhibit No. 105, introduced by the United States, at p. 17 states:

> "The duties and responsibilities of a trustee are imposed upon an escrow agent."

Cited as authority for that statement is *Farago v. Burke*, 237 App. Div. 351 (N.Y. 1933). The same case on appeal is at 186 N.E. 683 (1933). Other cases establishing the same rule are: *Hill v. Severn*, 258 N.Y.S. 2d 857 (1965); *Squire v. Branciforti*, 2 N.E. 2d 878 (1936); *Scully v. Pacific States Savings & Loan Co.*, 88 F. 2d 384 (1937); *Parker State Bank v. Pennington*, 9 F. 2d 966 (1925); *Buchanan v. Brentwood Federal Savings & Loan Ass'n.*, 320 A. 2d 117 (Pa. 1974).

In addition to the escrow arrangement as the basis for the trust, the only federal negotiator to testify admitted that the Treasury had a fiduciary responsibility in holding the funds to be impounded under the Interim Agreement. Dep. Tr. 9, A. 24 p. 17.

Further, documents from California, introduced by Louisiana in this case, disclose that the United States Treasury officials represented that the use of the identical deposit fund account subsequently used in this case as the "escrow account" creates a fiduciary relationship in the nature of a

trust, although not officially designated as a trust. La. Exh. 9-LPI 155, Dep. Tr. 39, La. Exh. 9-LPI 161, U.S. Exh. 47, A. 25 p. 17.

The facts as set forth above showing that the impoundment provisions of the Interim Agreement implied a trust are either admitted to be correct or not denied by the Special Master in his Order on Louisiana's motion for additional findings of fact.

Louisiana in its motion for additional findings of fact included as Request 9 the offer by the United States "to hold all proceeds of leasing in the disputed area in escrow," made in the Memorandum on the Maintenance of Status Quo quoted above. This request was denied on the ground that the memorandum was filed in a case not before the Special Master. But No. 15, Original, in which the memorandum was filed, was the proceeding that led to the execution of the Interim Agreement, so that the offer to hold the money in escrow is particularly significant as it referred to an agreement that ultimately became the Interim Agreement.

The Motion for additional findings of fact included:

> "10. During the negotiations for the Interim Agreement, the Federal negotiators represented to Louisiana that the money from the disputed area would be held in escrow. (La. Exh. I-LPI 38, 39, and 40; Tr. 50-54)"
>
> "11. Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly con-

firmed by Federal officials. (La. Exh. 1-LPI 20, 21, 22, 13 and 45; Tr. 206, 208, 210)."

In ruling on these requests, the Special Master stated:

". . . This appears to be correct; however, this fact does not alter the term of the agreement itself. . ."

Since the Special Master had already concluded that the term impoundment was ambiguous, this fact could not alter the terms of the agreement, but only interpret it.

The Motion for additional findings of fact included:

"6. Mr. George S. Swarth, an attorney, the only federal negotiator to testify, admitted that the holding of the impounded fund by the Treasury was a fiduciary responsibility. (Dep. Tr. 9)"

***

"12. Mr. Arnold Petty, Assistant Director of Administration for the Bureau of Land Management, agreed with the characterization of the Interim Agreement as 'in effect our escrow agreement.' (Tr. 444)

"13. Dr. John Haslem, expert witness for the United States, gave his opinion that the Federal Government treated the account under the impoundment provisions of the Interim Agreement in the same manner as a bank would treat an escrow account. (Tr. 836)"

In ruling on these requests (along with 17 and 28) the Special Master said:

". . .The summary of the testimony as given in the requests appears to be correct . . ."

The conduct of the parties in the administration of the offshore oil and gas properties con-

firmed the fiduciary relationship in the sense that it was in the nature of the conduct of joint venturers, which constitutes a fiduciary relationship. Tr. 116-117; 128-129; *DeWitt v. Sorenson*, 288 F. 2d 455 (5th Cir. 1961); *Walls v. Gribble*, 124 P. 2d 713 (Ore. 1942); *Selwyn & Co. v. Waller* 106 N.E. 321 (N.Y. 1914); *Fitz-Gerald v. Hull*, 237 S.W. 2d 256 (Tex. 1951); *O. K. Boiler & Welding Co. v. Minnetonka Lumber Co.*, 229 P. 1045 (Okla. 1924); *May v. Hellrick Bros. Co.*, 167 N.Y.S. 966 (1917); *Nelson v. Abraham*, 177 P. 2d 931 (Cal. 1947); *Stein v. George B. Searin, Inc.*, 184 A. 436 (N.J. 1936), A. 26 p. 19.

Therefore, Louisiana submits that the Special Master did not give consideration to the evidence and law which conclusively established that the impoundment provisions of the Interim Agreement implied a trust and imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money.

EXCEPTION 2

The State of Louisiana excepts to the failure of the Special Master to conclude that the United States used Louisiana's money for its own purposes and without any authority under the Interim Agreement.

The manner in which the Tidelands money was handled is undisputed. Report 11, A. 27 p. 21. The Tidelands money was deposited in the Federal Reserve Bank to the General Account of the Treasurer of the United States, where it was immediately available to meet any cash needs of the federal government whatsoever. Dr. Donald Woodland, who is presently Dean of the College of Business Administration at Louisiana State University, formerly employed as a financial economist for the Federal Reserve Bank, qualified as an expert witness in banking and finance and explained what happened to the money. He introduced a Flow Chart of Escrow Funds (La. Exh. 1-LPI 41, A. 28 p. 22) to show its progress into the General Account of the Treasurer. Dean Woodland concluded:

> "From examination of the records, they indicate that the Federal Government had complete use of the moneys that were deposited in the Federal Reserve Banks. The funds were available for general use of the Treasury." Tr. 187

When the cash was deposited to the General Account of the Treasurer, a bookkeeping entry of an equal amount was made on a deposit fund account, designated 14X6709 in the Treasury Department. The deposit fund account is a liability

account. There was no cash deposited to that account. Tr. 188-189, 397-399, A. 29 p. 22. Then when partial distribution was made pursuant to Court Decree, the money came from the General Account of the Treasurer without regard to source. Tr. 190-191.

The deposit fund account has frequently been referred to by federal officials as the Tidelands Escrow Account. These facts have all been admitted.

This is clearly evidenced by the United States' response to Interrogatory No. 8 of the First Set of Interrogatories propounded by Louisiana on July 23, 1976:

> "The statement is correct insofar as revenues from disputed lands were placed in the general account of the Treasurer (which is to be distinguished from the general fund of the Treasury) where they became immediately available to meet any cash needs of the Government whatsoever, and a bookkeeping entry was utilized to indicate the deposit fund liability of the United States with respect to such funds. The January 19, 1972 letter and the December 11, 1971 memorandum referred to in the Answer to Interrogatory No. 7 are incorporated herein as a more complete explanation." Tr. 200-202.

The letter and memorandum referred to (La. Exh. I-LPI 22, 20, and other letters of similar import from federal officials to Louisiana Senators (La. Exh. I-LPI 21, 19, A. 30 p. 24) confirm these facts and show that the United States used Louisiana's money. A high federal official, in his letter to Senator Long of December 13, 1971, stated:

"The effect of this is to make funds paid into the general account unrestricted (except for general rules of law) as to the purpose for which the moneys can be spent, in the same manner in this respect as if there were no escrow account." La. Exh. I-LPI 19, Tr. 198.

In addition, Dean Woodland gave four reasons to prove that Louisiana's money was used. A. 31 p. 28.

First, is the admission in the letter of December 22, 1971, from the Commissioner of Accounts of the Treasury Department, to the office of the General Counsel of the Treasury Department, that deposit fund receipts *are used* to finance general expenditures. La. Exh. I-LPI 20.

Second, Dean Woodland testified that since 1956, the federal government has run a deficit in that they have spent more money than they have taken in, and the only way the deficit was corrected was by borrowing. Therefore, he said, since the federal government spent more than they took in, the expenditures had to include Louisiana's money. La. Exh. I-LPI 42, 48, Tr. 213-216, 217-218.

Third, Dean Woodland testified that the velocity concept, as applied to this case, confirms the conclusion that the federal government had to have used Louisiana's money. He testified that the average turnover of all Treasury receipts was at the rate of about 113 times a year. This establishes that Louisiana's money must have been in-

cluded in the expenditures. La. Exh. 11-LPI 182, 183, Tr. 904-909.

Fourth, The Summary of Fiscal Operations prepared by the United States Treasury shows, on its face, that money which was subject to Deposit Fund Liability was used to pay off the public debt. La. Exh. 11-LPI 184, Tr. 908-914.

As Dean Woodland concluded: "The money was used." Tr. 921.

There is no provision in the Interim Agreement that authorizes the United States to use the Tidelands money for its own purposes without compensation to Louisiana. The Louisiana negotiators testified that there was no understanding or agreement that United States could have free use of the money. Tr. 55, 129, 136, 163, 173, 175, A. 32 p. 33.

We submit that under the evidence and formal admissions of the United States, there is no valid reason for failing to conclude that the United States used Louisiana's money for its own purposes without authority.

The Report states that the amount of money on deposit in the General Account of the Treasurer was at all times adequate to pay in full any award to Louisiana and at no time was the ability of the United States to perform its obligation under the Interim Agreement impaired. Report 12, 14. But that fact does not disprove the evidence that the money was used. The evidence does not indicate that the maintenance of a cash balance was any limitation on the expenditures. Dean Woodland

testified that the maintenance of a cash balance had no relevancy to expenditures or to the use of Louisiana's money. Tr. 904, 921. In fact, the use of Louisiana's money to maintain a cash balance would itself constitute a use of Louisiana's money for federal governmental purposes.

The Report further states that the United States did not have unrestricted use of the money because the amount of the liability recorded on the deposit fund account was not available for appropriation. Report 12. But the conclusion is contrary to the admissions of the United States and its fiscal officers.

As to the authority of the United States to use the Tidelands money, the Report in effect concludes that even though the money is deposited to the general account of the Treasurer, the maintenance of a liability deposit fund account is all that is necessary to satisfy the requirement in the Interim Agreement that the impounded funds be *held intact in a separate account*. Report 12-14. But this is contrary to the testimony of Louisiana's expert witnesses. Mr. Jerry Walker, partner in the international accounting firm of Arthur Andersen & Co., who qualified as an expert witness in accounting and finance, summed it up on cross-examination:

> "A. The Deposit Fund Account is not an account of the nature which would comply with the Interim Agreement.
>
> "Q. Is it not a separate account?
>
> "A. It is a separate liability account.

"Q. And the agreement requires something other than a separate account?

"A. It requires an account in which you can repose assets, cash or securities, or whatever it might be.

"Impounding, as I mentioned before, in defining impound, impound speaks of cash or other assets as it's said in the definition. And you cannot hold intact in a liability account cash or other assets. It is a contradiction in terms." Tr. 311.

Both Dean Woodland and Mr. Walker were repeatedly asked whether the deposit fund account was a separate account sufficient to comply with the requirements of the Interim Agreement. They both repeatedly replied that the deposit fund account was a separate *liability* account and that was not sufficient to comply with the contract. Mr. Walker further testified:

"Well, again, I keep coming back to this particular point. The Deposit Fund Account is a bookkeeping account. It simply keeps track of the amount of funds that have been received to date and how much are due by the Federal Government. You cannot impound funds in such an account." Tr. 311-312.

Finally, the Report states that the money was handled in the same manner as in the California case and the representatives of Louisiana were fully aware of this fact and accepted this method as proper under the Interim Agreement. But the evidence is conclusive that the Louisiana negotiators were *not* aware of the manner in which the money in the California case was handled and that there is no *evidence* that they accepted that method as sufficient. Tr. 93, 94, A. 33 p. 35.

EXCEPTION 3

The State of Louisiana excepts to the failure of the Special Master to conclude that the United States had the duty to invest the Tidelands money for the benefit of both parties.

The Special Master should have concluded that the United States had the duty to invest the Tidelands money for the benefit of both parties. There are several grounds upon which the obligation to invest is based and the Special Master erred in not giving predominance to any of them. It is just a question of when the duty to invest commenced. For the breach of this duty, the United States is required to account to Louisiana for the amount of interest that would have accrued to the impounded fund if proper investment had been made.

(a) The duty of the United States to invest the Tidelands money for the benefit of both parties is implied from the express provisions of the Interim Agreement that "the impounded *funds* provided for herein shall be *held intact* in a separate account for each lease or portion thereof affected."

The evidence shows that the United States set up the procedure for handling the Tidelands money in complete disregard of the Interim Agreement and acted only in accordance with Treasury policies. Two months before the Interim Agreement was executed, the federal Treasury set up the deposit fund account involved here pursuant to a decision from the Comptroller General (La. Exh. I-LPI 27, A. 34 p. 37) authorizing a change in the

accounting from a receipts account to a liability account, or deposit fund account. This was simply a bookkeeping entry on the liability side of the balance sheet and had no effect whatsoever on the use of the money by the Treasury. Tr. 191-192. Then when the Interim Agreement was executed on October 12, 1956, absolutely nothing happened and there was no change at all in the manner in which the money was being handled. The federal witness admitted that the deposit fund account was set up pursuant to Treasury Department policies and not by the requirements of the Interim Agreement. Tr. 405-406, A. 35 p. 38.

The Report states that "although this account was established in accordance with accepted government procedures prior to the execution of the Interim Agreement, this appears to be immaterial if it in fact conformed to the requirements of that agreement." Report 12. The Report then takes the position that the Interim Agreement only requires that the "fund itself," meaning the bookkeeping accounts, be held intact, and not the Tidelands money. Report 14.

But Mr. Walker testified that this is a misconstruction that would render meaningless the provision in the Interim Agreement that the "impounded funds" be held intact. He said:

> "A. But what did happen, of course, when the Interim Agreement was signed, in fact, was nothing. They continued to use the Deposit Fund Account as a bookkeeping or scorekeeping function to determine how much accumulated funds had been received from the Tidelands. And to believe that no additional

> obligation was imposed through the Interim Agreement would be to believe that the words 'impoundment' or 'to be held intact', 'impounded in a separate account' would be meaningless." Tr. 295.

A Dictionary for Accountants by Eric L. Kohler defines "impound" to mean "to seize and hold in protective custody . . . cash or other assets." Tr. 281, A. 36 p. 38.

Mr. Walker testified that the requirement that the "impounded *funds*" must be *held intact* created an obligation on the United States to invest the Tidelands money, for the benefit of both parties. Tr. 296-297, 347-348, 389-394, 890-892, 900-901, A. 37, 38 pp. 38, 39. Mr. Walker testified that the investment of the funds was an implicit requirement of the terms of the Interim Agreement:

> "Q. Would the Treasury have to have invested the funds in order to meet the requirements of the Interim Agreement?
>
> "A. In my opinion, yes. At some point in time they would have had to begin to invest." Tr. 308-309.

He gave his opinion as to what should have been done to satisfy the requirements of the Interim Agreement. He testified that the Tidelands money should have been held in a restricted account and after the lapse of a reasonable time, the money should have been invested in short term government securities and the proceeds credited to the impounded fund as an increment thereto, and then the process be continually repeated until distribution. What period of time is regarded as reasonable is a matter for the determination of the

United States Treasury, as depository, giving consideration to all of the facts and circumstances existing at the time. Mr. Walker suggested six months to a year, or year and a half, at the most. An exhibit and transcript of Mr. Walker's testimony explaining this procedure is included in the Appendix. La. Exh. I-LPI 49, Tr. 260-267, A. 39 p. 40.

In this way the United States could have used Louisiana's money in compliance with the Interim Agreement. What they did do was to use Louisiana's money in violation of the Interim Agreement.

Mr. Walker said:

"A. As I stated before, the Interim Agreement states that the funds were to be impounded in a separate account and that they were to be held intact."

"In my opinion that was not the case. The funds were not impounded, nor were they held intact." Tr. 256-257.

(b) Even if the Interim Agreement did not contain express provisions which imply the obligation to invest the Tidelands money for the benefit of both parties, such an obligation is imposed upon the United States, as a trustee, as a matter of law. It is well settled that a trustee has the duty to prudently invest the trust funds, absent express directions to the contrary, and if he fails to do so for an unreasonable length of time, he is chargeable with the amount of income which normally accrues from proper trust investment.

Sec. 181 of the Restatement of Trusts provides:

"The trustee is under a duty to the be-

neficiary to use reasonable care and skill to make the trust property productive.

"Comment: . . . c. Money. In the case of money, it is normally the duty of the trustee to invest it so that it will produce an income. The trustee is liable if he fails to invest trust funds which it is his duty to invest for a period which is under all the circumstances unreasonably long. If, however, the delay is not unreasonable, he is not liable.

"If the trustee commits a breach of trust in neglecting within a reasonable time to invest the money, he is chargeable with the amount of income which normally would accrue from proper trust investments. See §207."

See also Restatement of Trusts, §180, Comment d; *Langford v. Shamburger*, 392 F. 2d 939 (5th Cir. 1968); *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.C. 1971); *Bartlett and Company. Grain v. Commodity Credit Corp.*, 307 F. 2d 401 (8th Cir. 1962). A. 40 p. 47.

The Report cites no authorities to the contrary. The Report, however, rejects this contention by concluding that "the deliberate omission of a provision for the payment of interest from the Interim Agreement amounts to an understanding that it would not be paid." This conclusion is said to be based on the testimony of two of Louisiana's negotiators who stated that the reason the question of interest was never discussed was that "they knew that the United States would not enter into the agreement if a provision for the payment of interest was incorporated in it." Report 8.

But we submit that this misconstrues the full context of the relevant testimony of these witnes-

ses which is set forth in the Appendix. A. 41, 42 pp. 52, 54. Three of the original negotiators for Louisiana testified at the trial and one federal negotiator gave his deposition. The negotiators testified that the subject of interest was never discussed, and that the subject of the investment of the money was never discussed. The full context of the testimony of the Louisiana's negotiators referred to in the Report indicates that they were referring to the rejection of Louisiana's proposal that the Louisiana banks act as third party escrow agents. The Louisiana negotiators testified that there was no understanding or agreement that the United States could have free use of Louisiana's money and one said that Louisiana would never have entered into such an agreement. This testimony amounts to a denial of any understanding that interest would not be paid. Therefore, it is unreasonable to assume such an understanding by silence. Since the subject of interest was never discussed, any statements with respect to what the parties might or might not do (other than the discussion of the Louisiana escrow proposal) would be a subjective mental reservation. It is well settled that in the interpretation of contracts, consideration will not be given to undisclosed mental reservations of the parties. 17A C.J.S. Contracts §295 at 66 67; Corbin on Contracts §538 at 506-509; *First National Bank in Dallas v. Rozelle*, 493 F. 2d 1196 (1974); *Bach v. Friden Calculating Mach. Co.*, 155 F. 2d 361 (1964); *United States Nav. Co. v. Black Diamond Lines*, 147 F. 2d 958 (1945).

Corbin, *supra* at 508, had this to say:

> "The court is not searching for an unexpressed mental state; instead, it is searching for the meanings that each party intended to convey by his words and acts, and for the meanings that those words and acts conveyed to the other party."

But, in any event, there is one fact that was discussed that should settle this matter. The record is undisputed that both parties thought that the Interim Agreement would be of short duration. One Louisiana negotiator said:

> "and we discussed this on many occasions in the negotiations between the Federal Government and the State of Louisiana--we thought it would take about a year. You thought it would take six months." Tr. 69.

During the negotiations, the federal negotiators proposed that the agreement be limited to a period of six months and Louisiana proposed one year. La. Exh. I-LPI 6, Tr. 125-126, A. 43 p. 56. In view of the expressed belief by both parties that the contract would be of short duration the most unfavorable construction that could be put on the testimony of the Louisiana negotiators would be to infer a temporary acquiescence of not more than a year or a year and a half. The United States would then be required to invest the Tidelands money under the implied obligation of the Interim Agreement or under the law. It would be entirely unreasonable to infer an understanding by the silence of the Louisiana negoiators that the United States could have free use of Louisiana's money for over twenty-three years.

Therefore, the United States had the duty to

invest the Tidelands money (whether required by the implied obligation of the Interim Agreement, or by the fiduciary obligation of a trustee, as a matter of law) within the reasonable time of a year and a half after the execution of the agreement of October 12, 1956.

(c) The refusal of the United States to honor Louisiana's request to take such steps as are necessary to invest the Tidelands money and accrue the profit as an increment to the impounded fund constituted a breach of the fiduciary relationship.

On June 6, 1967, the Louisiana legislature adopted Concurrent Resolution No. 251 which requested:

> "Be it Further Resolved that the Legislature of Louisiana does hereby respectfully request and urge the above named officials to take such steps as are necessary to effect a prudent and effective investment of the funds now and hereafter so impounded, with a view to increasing the increment deriving both to the Federal Government and to the State of Louisiana." A.44 p. 57.

But, instead of complying with this request, Mr. John Carlock, Fiscal Assistant Secretary for the United States Treasury, wrote a letter on June 14, 1967, to the Governor of Louisiana, in which he stated:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of statutory authority." La. Exh. 13-LPI 180.

This response was made on behalf of the Treasury Department of the United States, the Secretary of the Interior, the Attorney General and the Solicitor General to whom copies of the Resolution had been sent. A. 45 p. 58.

But certain documents discovered shortly before the trial of this case and introduced into evidence, reveal that the United States, by its own representations, did have authority to agree to the investment of the impounded funds under the Outer Continental Shelf Lands Act.

Prior to the passage of the Outer Continental Shelf Lands Act on August 7, 1953, the then-Fiscal Assistant Secretary for the United States Treasury, in his letter to the California Comptroller, stated that money held in custody by the Treasurer of the United States could not be invested unless specifically authorized by law. La. Exh. 9-LPI 155, A. 46 p. 58.

Then, after the passage of the Outer Continental Shelf Lands Act, Mr. J. Lee Rankin, Assistant Attorney General of the United States, sent to California a proposed stipulation which contained the following provision:

> "The United States may invest and reinvest any of the funds covered by this paragraph in obligations of the United States Government, and all interest received, as well as any increase or decrease in the value of the investments, shall accrue to or be charged against said fund as the case may be." La. Exh. 9-LPI 166.

This was followed by a letter referring to the

proposed stipulation in which Mr. Rankin said:

> "This draft contained authority for the United States to invest the funds held by it."

Thus it appears that the demand by the Louisiana Legislature was refused by Mr. Carlock's letter, notwithstanding the fact that there was statutory authority in the Outer Continental Shelf Lands Act after August 7, 1953, as interpreted by agents and officials of the United States.

This conclusion was admitted by the federal negotiator when Mr. Rankin's letter and the proposed stipulation were presented to him on cross-examination at his deposition. Dep. Tr. 44-45.

Therefore, at the very latest point in time, the United States should have commenced investing the impounded funds and accrued the proceeds for the interests of both parties, upon receipt of this Resolution.

In *Blankenship v. Boyle, supra,* it is said:

> "The beneficiaries were in no way assisted by these cash accumulations, while the Union and Bank profited; and in view of the fiduciary obligation to maximize the trust income by prudent investment, *the burden of justifying the conduct is clearly on the trustee.*" (Emphasis added.)

Louisiana has met the burden of establishing the fiduciary obligation to invest the Tidelands money and maximize the trust income by prudent investment. It was up to the United States to justify the refusal to do so on valid grounds. The refusal based upon the mistaken legal opinion that

the Treasury had no statutory authority to make an investment, which had been refuted by the United States' own legal counsel, could not constitute a justifiable excuse.

These facts were the subject of Louisiana's motion for additional findings of fact, No. 2. In overruling the request, the Special Master said:

> ". . .The quotations from these documents given in the requests appear to be correct, as well as the statements regarding their preparation, delivery and receipt; . . ."

The Report states that the language of the request was precatory and not demanding. Report 9. But the request was by formal Resolution of the Louisiana Legislature and was couched in the formal verbiage customary for demands by public bodies. The Report also finds that Louisiana "accepted this explanation, as it made no protest." Report 10. But the refusal was adamant. The law does not require a vain and useless protest. *Lex neminem cogit ad vana seu inutilia peragenda.* Furthermore, it has been held that where a trustee has benefitted by his actions, there is no question of acquiescence unless he had made a complete disclosure. *Langford v. Shamburger, supra.* The United States made no disclosure of the facts. The Report further concludes that in the absence of an amendment to the Interim Agreement, there was no obligation to invest. Report 10. But as a trustee, the United States should have complied with Louisiana's request, even if it required an amendment to the Interim Agreement in order to satisfy the federal accounting procedures.

(d) The 1841 Act of Congress requires that all funds held in trust by the United States, together with annual interest thereon, be invested in interest-bearing securities at not less than 5 percent per annum. 3l U.S.C. §547(a) provides:

> "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 percent per annum." A. 47 p. 63.

The Report says that this statute does not apply to the present situation, (Report 8) but no reasons or authorities are given. This statute is not limited to trust funds created by special Act of Congress or specified or identified by any federal statute or governmental department or agency. Nor is it limited to trusts for any specific purposes. This statute refers to "all" funds held in trust by the United States. If it means what it says, it applies to the Tidelands money held by the United States under a trust implied for the express language of the Interim Agreement.

This statute applies to implied trusts as well as expess trusts. The Outer Continental Shelf Lands Act authorized the parties to enter into an agreement for the impounding of the disputed money under such terms as they could agree upon. The act authorized an agreement to invest the impounded money if the parties should so provide. The parties did so provide. First, they agreed upon express language in the impoundment provisions of the Interim Agreement from which the obligation to in-

vest is implied. Second, they agreed upon the creation of an escrow arrangement which constituted a fiduciary relationship from which the law required investment. Therefore, the obligation to invest the trust funds already existed and was further implemented by this statute.

The Report states that this statute does not authorize the payment of interest. Report 8. But, if the trustee invested the trust funds and made a profit, his fiduciary duty would require that he account to the beneficiary for its share, absent express authority to the contrary. 90 C.J.S. Trusts §341(a) at 599, A. 48 p. 64.

Therefore, it is submitted that the failure to comply with this statute makes the United States chargeable to account to Louisiana for compound interest at the rate of 5 per centum per annum that should have been recovered from investment under the mandate of the statute, commencing within a reasonable time after the execution of the Interim Agreement on October 12, 1956.

(e) The Report states that the Supplemental Decree of June 16, 1975 does not order any payment of an amount, either by way of interest or payment for the use of Louisiana's money. Report 14. But the 1975 Decree does not purport to limit or adjudicate the scope of the accountings. What is to be accounted for depends upon the provisions of the Interim Agreement and the applicable law. This is evident by paragraphs 8 and 11 of the Decree.

Paragraph 8 provides:

> "It is understood that the parties may be unable to agree on whether offsets are permit-

ted or whether interest may be due on funds impounded pursuant to the Interim Agreement of October 12, 1956, or upon calculations or audits, and these issues, as well as others not expressly treated herein, shall in no way be affected by this Decree."

The parties have construed the word "affected" to mean "prejudiced." In the joint motion by the parties upon the submittal of this Decree, it was stated:

> "Additionally, paragraph 8 provides that present or future differences between the parties not expressly treated by the decree, are not *prejudiced* by the decree." (Emphasis ours.)

Paragraph 11 provides:

> "The parties are directed to prepare a final decree for entry by this court in the near future resolving the additional issues required to be dealt with that this litigation may be terminated, to include, but not necessarily limited to, unresolved issues, if any, *concerning accountings and payments*, offset claims, payments to others, ambulatory boundary complexities or administrative problems." (Emphasis ours.)

EXCEPTION 4

The State of Louisiana excepts to the conclusion of the Special Master that the equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are inappropriate to the situation here presented.

The United States has been unjustly enriched by the use of Louisiana's money for its own benefit without compensation to Louisiana. The evidence establishes: (1) The United States used Louisiana's money for its own governmental purposes, and thereby profited by the reduction in borrowing. (2) Louisiana suffered a loss by not receiving any benefit from the use of its money. (3) The enrichment is unjustified and inequitable and therefore constitutes unjust enrichment. The United States should be required to account for the value of the use of Louisiana's money under a constructive trust as an increment to the impounded fund, or by way of quasi contract as an unimpounded personal obligation. The Report does not address the merits of this issue and cites no authorities to justify the denial of equitable relief. The Report simply states that the United States has not breached the terms of the Interim Agreement. Report 11.

But the breach of contract is not the issue. The Special Master in effect found that the Interim Agreement only required the keeping of bookkeeping entries to record the amount of the Tidelands money deposited to the general account of the Treasurer and the ultimate payment to Louisiana of its share. Assuming that this interpretation is

correct, which we deny, it may follow that the United States did not breach the contract by the use of the money, but it does not follow that the United States had *free* use of the money. The contract is silent on whether the United States must pay for the value of the use of Louisiana's money or pay interest for its use. It is sufficient that the Interim Agreement does not expressly authorize the use of Louisiana's money without compensation.

The prevention of unjust enrichment is a cardinal principle of equity. It appears as Sec. 1 of Restatement of the Law of Restitution:

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

For a discussion of unjust enrichment, see *Unjust Enrichment: A Comparative Analysis* by John P. Dawson.

The equitable remedy of constructive trust should be impressed upon the amount of money saved by the United States from the use of Louisiana's money and would be an increment to the impounded fund. It would be subject to the impounded fund accounting. For the definition of a constructive trust, see: 89 C.J.S. Trusts §15 at 726; 76 Am. Jur. 2d Trusts §221 at 446; 76 Am. Jur. 2d Trusts §223, at 448; 71 Law Quarterly Review 39 (1955); *Buchanan v. Brentwood Federal Savings & Loan Association, supra.* Volume 5 of Scott on Trusts at §462, quotes Judge Cardozo, who, when sitting on the Court of Appeals of New York, said:

> "A constructive trust is the formula through which the conscience of equity finds expression."

Fraud is not necessary for a constructive trust. *Proctor v. Sagamore Big Game Club*, 265 F. 2d 196 (1959); *Dubin Paper Co. v. Insurance Company of North America*, 63 A. 2d 85, 94-95 (1949); 5 A. Scott, Law of Trusts §462 at 3102; *Springer v. Springer*, 125 A. 162, 168 (1924); *Franks v. Lockwood*, 150 A. 2d 215 (Conn. 1959); *Hill v. Waxberg*, 237 F.2d 936 (9th Cir. 1956).

Constructive trust is commonly applied to prevent unjust enrichment resulting from the breach of a fiduciary relationship. 71 Law Quarterly Review 47; 5 A. Scott, Law of Trusts §462 at 3102; 89 C.J.S. Trusts §151 at 1063; *McDonald v. Miller*, 16 N.W. 2d 270 (N.D. 1944).

The amount of money *saved* by the United States by the use of Louisiana's money in reducing its borrowing needs can constitute the *trust res* of a constructive trust. 71 Law Quarterly Review at 48; 5 A. Scott, Law of Trusts, §462.1 at 3106; S. Litvinoff, *Obligations* §71 at 101-102, 6 *Louisiana Civil Law Treatise*; 5 A. Scott, Law of Trusts §462.3 at 3107. Comment (b) to Sec. 1 of Restatement of Restitution states:

"b) He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss."

The evidence in this case shows that the United States used Louisiana's money to reduce its borrowing needs. The United States thereby saved the amount it would have otherwise had to pay as interest. The amount is ascertainable, and in fact, has been ascertained. While the amount for which the United States must account for the use of

Louisiana's money was not an issue at the hearings before the Special Master at this time, nevertheless, it is relevant that the amount is ascertainable with reasonable certainty. To establish this fact, calculations were made under simulated conditions which show that the United States saved approximately one billion and seventeen million dollars in interest by the use of the entirety of the Tidelands money, of which Louisiana's share as of June 16, 1975, would be about $88 million. Tr. 306-307, 308, A. 49 p. 65.

As an alternative, the equitable remedy of quasi contract should be imposed as an unimpounded personal obligation to prevent the unjust enrichment of the United States by the use of Louisiana's money. The amount of money saved by the United States would be subject to the unimpounded fund accounting. As with the constructive trust, the quasi-contractual obligation is imposed as a matter of law, and is not dependent upon agreement of the parties. For the definition of a quasi contract see: F. Woodward, *Law of Quasi Contracts*, §3 at 4-5; 21 Yale Law Journal 551; F. Woodward, *Law of Quasi Contracts*, §4 at 6 where it is stated:

> "He is bound, not because he has promised to make restitution--it may be that he has explicitly refused to promise--but because he has received a benefit the retention of which would be inequitable."

See also W. Keener, *A Treatise on The Law of Quasi Contracts* at 19; *Rice v. Wheeling Dollar Savings & Trust Co.*, 99 N.E. 2d 301 (Ohio 1951); *Herrmann v. Gleason*, 126 F. 2d 936 (1942); *Matarese v. Moore-McCormack Lines*, 158 F. 2d 631 (2nd Cir. 1946).

In *Phillips Petroleum Co. v. Adams*, 513 F. 2d 355 (5th Cir. 1975) there was no breach of contract, but the court gave equitable relief to prevent unjust enrichment. This case involved money held "in suspense" pending the final determination of an application for a rate increase before the Federal Power Commission. The court said:

> ". . . Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc. Such a course was certainly sound business practice, and in no way repugnant either to the federal regulatory scheme or to Phillip's contractual relations with its suppliers. But that is not to say that Phillips may enrich itself with the income from the Adams family's suspense money in the absence of any contractual sanction."

The court concluded:

> "To exonerate Phillips from its interest obligation here would be to give the pipeline company an extracontractual lagniappe, for it is incontrovertible that Phillips has derived a very considerable benefit from the unrestricted use of the Adams family's money. Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, but Phillips cannot be heard to say that it is fair and equitable that it should enjoy such financial advantage for so long, and not pay a cent for it." A. 50a p. 66, 67.

In *Buchanan v. Brentwood Federal Savings & Loan Ass'n., supra*, there was no breach of contract, but the court held that equitable relief would be proper to prevent unjust enrichment once it is established. That case involved a claim by mort-

gagors that the profits earned from the tax and insurance escrow account of the lending institutions should be shared with the mortgagors. The court said:

> "The question whether a constructive trust is to be imposed on the profits earned by the investment of mortgage lending institutions of appellants' monthly tax payments can be resolved only by answering the more fundamental question whether 'the conscience of equity' would conclude that the mortgagees would be unjustly enriched were they permitted to keep the funds." A. 50b p. 69.

Equitable relief to prevent unjust enrichment has been applied against the United States notwithstanding a claim of immunity from interest. *Henkels v. Sutherland*, 271 U.S. 298 (1926) involved a claim under the Trading with the Enemy Act to recover the profit earned from the investment of the proceeds of stock mistakenly seized and sold as an enemy property. The United States Supreme Court said:

> "We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment." A. 51 p. 73.

Further, it is a well established principle that when a sovereign comes into court as a plaintiff, it loses its sovereign immunity, not only as to the right to be sued, but also as to any defense that may be based on immunity. When a sovereign

comes into court as a plaintiff, it becomes subject to the same rules of law and equity that apply to private suitors. *United States v. National City Bank of New York*, 83 F. 2d 236 (1936); *The Gloria*, 286 F. 188 (1923); *Mountain Copper Co. v. United States*, 142 F. 625 (1906); *Walker v. United States*, 139 F. 409 (1905); *United States v. Barber Lumber Co.*, 169 F. 184 (1908).

The rule is concisely stated in *United States v. National City Bank of New York, supra*:

> "When a soverign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases."

From the above, it appears that under the common law the word "unjust" in the term "unjust enrichment" means unfair or inequitable. The enormous disparity in the value of the administrative services rendered by Louisiana for the gratuitous benefit of the United States, as compared to the pittance contributed by the federal agencies, makes the free use of Louisiana's money by the United States clearly inequitable.

Mr. Thomas M. Winfiele, long time Chief Engineer for the Louisiana Conservation Department, described in detail many valuable administrative services rendered by Louisiana resulting in benefit to the United States, at the cost to Louisiana of up to 39 percent the total annual Conservation Commission budget. La. Exh. 10-LPI 173 series, Tr. 928-939; La. Exh. 10-LPI 174 Series, La. Exh. 10-LPI 175 Series and LPI 176 Series, Tr. 939-946, 947-948, La. Exh. 10-LPI 172, Tr. 848-949.

Mr. Winfiele also testified about the program of secondary operations sponsored, encouraged and supervised by the Louisiana Conservation Department which was conducted on an area decreed by the court to be wholly federally owned, which resulted in great benefit to the United States. Tr. 951-956. The sum total of the estimated increase in ultimate recovery of oil due to these operations is 343, 384, 081 barrels. (La. Exh. 10-LPI 177). At the price of $5.59 per barrel prevailing at the time of the trial before the Special Master, the total value of the additional oil recoverable through secondary recovery operations should be about $2 billion dollars from which the United States would receive its royalty. Tr. 956-958 A. 52 p. 75.

There is nothing in the record to show that the United States did anything except hold a few drainage lease sales with the assistance of Louisiana in accordance with Interim Agreement, and act as depository for the money.

Under these circumstances, it would be unconscionable for the United States to also receive free use of Louisiana's money.

CONCLUSION

WHEREFORE the State of Louisiana requests that the Supplemental Report of the Special Master filed August 27, 1979 be modified as to the First Issue in accordance with the foregoing Exceptions and that the Supplemental Report be accepted and approved as to the Second Issue and the Third Issue and that the Special Master be ordered to proceed to make his recommendation to the Court as to the amount for which the United States should account and pay to the State of Louisiana for the value of the use of the escrowed funds or for interest on the funds.

Respectfully submitted,

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PROOF OF SERVICE

I, the Attorney General of the State of Louisiana, certify that copies of the foregoing Exceptions of Louisiana to the First Issue in the Supplemental Report of the Special Master filed August 27, 1979, with brief in support thereof, and appendix thereto and Motion for Oral Argument have been properly served on the 15th day of November, 1979, by mailing copies, sufficient postage prepaid, to the Solicitor General and to the Attorney General of the United States, Department of Justice, Washington, D.C. 20530.

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In the Supreme Court of The United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,
Defendants.

APPENDIX TO THE BRIEF IN SUPPORT OF EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FIRST ISSUE IN THE SUPPLEMENTAL REPORT OF THE SPECIAL MASTER FILED AUGUST 27, 1979

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INTRODUCTION

Background of Interim Agreement

1. The United States moved for leave to file suit in the United States Supreme Court against the State of Louisiana to quiet title to the submerged lands off the coast of Louisiana on December 19, 1955. A copy of the complaint accompanied the motion. *Motion of the United States for Leave to File Complaint, Complaint and Brief in Support of Complaint,* No. 15 Original.

2. On March 26, 1956, the motion was granted, 350 U.S. 990, and the proceeding by the United States against Louisiana for ownership of the submerged lands off the coast of Louisiana was commenced as No. 15 Original.

3. Mr. Edward W. Carmouche "filed in State Court, the Fourteenth Judicial District, . . . a case entitled *State of Louisiana vs. Anderson Pritchard, et al., and the United States Government* [which] led to an injunction being granted . . . to enjoin the sale and any trespassing being committed by the oil companies and the Federal Government in the disputed area." Testimony of Edward W. Carmouche, Tr. 33.

4. "The Federal Government and the oil companies sought to remove the case to the Federal Court, and they were successful in getting it removed to the Western District before Judge Hunter presiding. And Judge Hunter also granted the State of Louisiana an injunction." Testimony of Edward W. Carmouche, Tr. 35.

5. The Federal Government then filed a motion in *United States v. Louisiana*, No. 15, Original, in the United States Supreme Court to stay the injunction that had been granted in the *Anderson Pritchard* case. Testimony of Edward W. Carmouche, Tr. 35.

6. As a result of that motion, the Supreme Court of the United States issued an order on June 11, 1956 which provided:

> "No. 15, Original. UNITED STATES v. LOUISIANA.
>
> Upon consideration of the motion of the United States for an injunction or other interlocutory relief in cases involving the controversy pending before this Court in the case of *United States of America v. State of Louisiana*,
>
> IT IS ORDERED that the Attorney General of the State of Louisiana and others named and others acting with them are enjoined from further prosecuting or taking any proceedings in a certain cause now pending in the Fourteenth Judicial District Court in and for the Parish of Calcasieu, State of Louisiana, entitled *State of Louisiana v. Anderson-Prichard Oil Corporation et al.*, Number 38780 on the docket of said court, and from prosecuting any other case or cases involving the controversy before this Court until further order of the Court, and
>
> IT IS FURTHER ORDERED that the State of Louisiana and the United States of America are enjoined from leasing or beginning the

drilling of new wells in the disputed tidelands area pending further order of this Court unless by agreement of the parties filed here." *United States v. Louisiana*, 351 U.S. 978 (1956)

7. That motion of the Court's order resulting therefrom is part of the present case [Tr. 35-36]:

"Q. That motion filed by the Federal Government was in Number 15 Original?

"A. Yes, sir.

"Q. In the United States Supreme Court?

"A. Yes, sir. There was some confusion. Some of the papers were filed, Original Number 9; and some of them were Number 15. But the Anderson Prichard case was, generally speaking, entitled Original Number 15.

"Q. Now, the motion filed by the Federal Government in Original Number 15, that is this case?

"A. That is correct.

"Q. And the number has changed over the years by various terms of the Court?

"A. Yes.

"Q. But it is still the litigation which is now pending before —

"A. That is a correct statement.

"Q. (Continuing) — the Special Master?

"A. Right.

"Q. Then, the United States Supreme Court then issued, as a result of the Federal Government filing a motion to enjoin the actions which had been commenced by Louisiana, the Federal Government then issued the injunction of June 11, 1956, as recited in the Whereas provision of the Interim Agreement, is that correct?

"A. That is correct.

"Q. So that thereby the Interim Agreement was born?

"A. Yes, sir. That led to the Interim Agreement."

8. The effect of the June 11, 1956 injunction shutting down operations in the disputed area was described as "almost catastrophic" by Mr. C. J. Bonnecarrere, Secretary of the Louisiana State Mineral Board. Testimony of C. J. Bonnecarrere, Tr. 109.

9. Pressure to reach an agreement for the continuation of operations pending litigation was great as indicated by the July 23, 1956 letter from the Offshore Operators Committee signed by quite a number of oil and gas operators in the offshore area and addressed to Hon. Fred A. Seaton, Secretary of the Interior; Hon. Herbert Brownell, Jr., Attorney General of the United States; Hon. William G. Hellis, Jr., Chairman of the State Mineral Board; and Hon. Jack P. F. Gremillion, Attorney General of Louisiana:

"While the sweeping injunction had not been anticipated, the oil and gas industry immediately foresaw the harsh and irreparable damage that would be suffered if an agreement were not reached between Louisiana and the United States before a complete shutdown of drilling operations occurred in the disputed tidelands area. Accordingly, during this six-weeks period we have attempted diligently to maintain full employment in spite of our inability to begin the drilling of new wells. In some instances, we used expensive rigs and equipment on reworking operations that should have been moved to new locations for the drilling of exploratory or development wells; and in isolated cases, we have moved rigs into the area that is not in dispute. However, even this good-faith effort has not prevented a partial shutdown and cannot under any circumstances prevent a complete shutdown unless the injunction against future drilling is removed.

***

"To avoid the serious dislocation and financial loss which will inevitably occur by the continuance in effect of the injunction, we urge you to enter into a stipulation which will grant immediate relief to the industry and the public in this situation. We respectfully submit that this can be satisfactorily accomplished by the filing at this time of a stipulation covering two points on which apparently no controversy exists between the United States and the State of Louisiana. These points are:

1. That the injunction be modified to permit the resumption of drilling under existing leases;

2. That all future payments accruing under these leases be despoited in escrow pending the final settlement or adjudication of the controversy between the United States and the State of Louisiana."

La. Exh. 1 - LPI No. 13; Testimony of C. J. Bonnecarrere, Tr. 108 - 112; Testimony of Marc Dupuy, Jr., Tr. 158.

10. In order to lift the injunction, the Legislature of the State of Louisiana enacted Act 38 of 1956 which authorized the State Mineral Board with the concurrence of the Attorney General to enter into agreements or stipulations with the United States as provided for in the injunction order of the United States Supreme Court. Act 38 specifically granted authority to enter into agreements "respecting . . . the deposit in escrow or impounding in whole or in part of bonuses, rents, royalties, and other sums payable thereunder pending the settlement or adjudicating of the controversy." La. Act 38 of 1956, La. Ex. 1 - LPI No. 3.

11. The authority of the United States to enter into agreements with the State of Louisiana "respecting operations under existing mineral leases and payment and impounding of rents, royalties, and other sums payable thereunder" was provided by Section 7 of the Outer Continental Shelf Lands Act, August 7, 1953, 67 Stat. 467, 43 U.S.C. 1336.

12. The distinction between a debt and a trust is stated in 1 A. Scott, Law of Trusts §12.2 at 108 (2d ed. 1956):

"The question in each case is whether it was intended that the person receiving the money should hold it for the benefit of another, or whether it was intended that he might use it as his own, being under a merely personal liability to pay a similar amount of money. In the latter case a debt and not a trust is created."

EXCEPTION 1

The Interim Agreement imposed upon the United States the Fiduciary Duty of a Trustee.

13. Louisiana negotiators had authority to enter into agreements with the United States to provide for the deposit in escrow or impounding of revenues from the disputed area. La. Act. 38 of 1956, June 17, 1956; La. Exh. 1-LPI No. 3.

14. Louisiana negotiators testified that the words "impoundment" and "escrow" were used interchangeably throughout the negotiations by federal and state negotiators. Testimony of Edward W. Carmouche, Tr. 40, 49; testimony of Marc Dupuy, Jr., Tr. 161; testimony of C. J. Bonnecarrere. Tr. 128.

15. In June, 1956, the United States filed a *Memorandum for the United States on Maintenance of the Status Quo* in *United States v. Louisiana*, No. 15 Original, in response to the invitation of the United States Supreme Court for the parties to the dispute to express their views. 351 U.S. 946 (1956). The United States made the following representation to the Court:

> "The United States stands ready and willing to enter into an agreement with Louisiana to hold all proceeds of leasing in the disputed area in *escrow* pending a determination of the case on its merits." (Emphasis added.)

16. Louisiana's first proposal to the United States for a "Stipulation" to be entered into pending the final settlement or adjudication of the controversy contained a provision in paragraph 4 for a separate, independent escrow agent. La. Exh. 1-LPI No. 5. Testimony of Edward W. Carmouche, Tr. 43 - 46.

17. Contemporaneous notes of Mr. C. J. Bonnecarrere made at the time of the negotiations between officials of the United States and Louisiana on July 2-3, 1956 recorded the initial response of the federal officials to Louisiana's proposed Stipulation:

> "It should be noted here, or at least I got the impression, that when the U.S. Government Delegation returned to the Conference Room the atmosphere had changed completely. I mean that the friendly and jovial bantering ceased and there was a feeling of tenseness on their part.
>
> "The discussion again reverted to Zone II, involving an impounding of revenues. Mr. Armstrong stated that the U.S. Government would be willing to take the monies received, much of which was being held in suspense, and place same, with the consent of the respective Company or Companies involved, in a single escrow fund."

La. Exh. 1 - LPI No. 6. Testimony of C. J. Bonnecarrere, Tr. 121-123.

18. The United States further responded to Louisiana's proposed Stipulation by submitting a new draft of an agreement in which the word "escrow" was replaced with the words "impound" and "held intact". La. Exh. 1 - LPI No. 7. Testimony of Edward W. Carmouche, Tr. 45-47.

19. The change in the terminology from "escrow" to "impound" and "held intact" did not change the intent of the negotiators as Mr. Carmouche testified [Tr. 47 - 49]:

"Q. Now, why did you agree to the change from separate independent escrow agent to the provision that the United States should act as escrow agent?

"A. It appeared that the United States was adamant on this point, and we were under enormous political pressures at home.

"Thousands of people had been put out of work as a result of this Act. And there were tremendous pressures by the oil companies, by the employees who had been paid off by the Federal Government; and we had to move. We had to get the best agreement we could get out of it.

"Q. Did you intend at that time, or did you understand at that time, that the obligations of the escrow holder, whoever it would be, would be any different if the United States was the escrow agent as a third party?

"A. It was never discussed that the United States would act as anything other than a regular fiduciary escrow holder of funds than we would do in our private contract.

"Q. Is it a fact, Mr. Carmouche, that one of the reasons that you agreed to the change of the proposal that the money be held by a third-party escrow agent to the United States was due to the fact that you thought there would only be a change of the depository?

"A. Yes. We were assured of that.

"Q. What was your understanding at that time of the meaning of the words 'impound' and 'hold intact?'

"A. We used the words 'impound' and 'escrow' interchangeably. We felt that the escrow holder or the holder of the impounded funds had the regular duties of an ordinary fiduciary as established under any private contract.

"Q. Did you have any reason to believe that the Federal negotiators also interpreted the language of 'impound' 'hold intact' in the same manner in which Louisiana was interpreting the terms?

"A. It was our belief that they looked upon this in the same manner as the officials of the State of Louisiana looked upon it; and that is, that it would be escrowed or impounded in a separate fund and kept intact. In fact, we were reassured on numerous instances."

20. During the negotiations for the Interim Agreement, the Federal negotiators represented

to Louisiana that the money from the disputed area would be held in escrow. Testimony of Edward W. Carmouche, Tr. 50-54.

a. In a letter dated July 30, 1956, from Mr. Carmouche to Mr. Gremillion, the then-Attorney General for Louisiana, and to Mr. Helis, the then-Chairman of the State Mineral Board, it is stated:

> "Armstrong [Reuel Armstrong, the principal federal negotiator] assured us that the Federal government would *escrow* all back monies . . . ." (Emphasis added.) La. Exh. 1-LPI No. 40.

b. On July 30, 1956, Mr. Carmouche wrote a report of a conference which he had with Mr. Reuel Armstrong on July 19, 1956, wherein it was stated:

> "The Federal government would agree to *escrow* the back monies." (Emphasis added.) La. Exh. 1-LPI No. 39.

21. Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly confirmed by Federal officials. Testimony of Dr. Donald Woodland, Tr. 198, 206, 208, 210.

a. The letter of December 13, 1971 from Mr. Laurence N. Woodworth, Chief of Staff, Joint Committee on Internal Revenue Taxation, Congress of the United States, to

Senator Long, contains the following statements:

> "You and Senator Ellender have inquired of me the manner in which *escrow accounts* are handled by the Federal Government.
>
> "Specifically, the *escrow account* which I understand you have reference to is the account relating to the Tidelands dispute by the State of Louisiana and the United States.
>
> ***
>
> "At the time the cash is paid into this account an equal amount is credited to the *escrow or deposit account.*
>
> ***
>
> "To summarize, while amounts held in *escrow* by the United States are not classified as budgetary receipts they are available for expenditure for general Governmental purposes." (Emphasis added.) La. Exh. 1-LPI No. 19.

b. In the letter from David Mosso, Commissioner of Accounts of the United States Treasury Department, to Mrs. Lloyd of the Office of the General Counsel of the Treasury Department dated December 22, 1971, reference is made to a request for a statement of the fiscal significance of the transfer to Louisiana of money from the "*escrow*

account." (Emphasis added.) La. Exh. 1-LPI No. 20.

c. Letters from David Mosso to Senators Ellender and Long dated January 10, 1972 and January 19, 1972, respectively, contain the following statements:

> "The *escrow account* with which you are concerned is that bearing the Treasury symbol 14X6709, entitled 'Deposits, Outer Continental Shelf Lands Act, Agreement October 12, 1956, Louisiana'; the account is classified as a Department of the Interior deposit fund account. A brief statement concerning that account may be helpful.
>
> ***
>
> "The collections relating to the *Louisiana Tidelands escrow funds* in question are deposited by the Department of the Interior into a Federal Reserve bank and become part of the cash comprising the general account of the Treasurer, U.S.
>
> ***
>
> "However, at the time of the deposit of the *Tidelands escrow fund* collections by the Department of the Interior, ...'" (Emphasis added.) La. Exh. 1-LPI Nos. 21 and 22.

d. Mr. Warren W. Scott, Analyst in Mineral Economics, Natural Resources Section of the Library of Congress, in an interdepart-

ment report dated October 21, 1964, made the following representation:

> "At the present time, the U.S. Department of the Interior *is holding about $700 million in escrow* from oil and gas and other natural resources leases in the offshore areas in dispute which are somewhere between the uncertain 3 and 10.5 geographical mile limits." [See p. 3 of report.] (Emphasis added.) La. Exh. 1-LPI No. 23.

e. An excerpt from a financial statement of the Bureau of Land Management as of the fiscal year 1975 shows the following footnote:

> "This includes $1,084,852,312 *held in escrow* pending final Court Decision as to its disposition among the United States Treasury and the States of Louisiana, Texas . . . ." (Emphasis added.) La. Exh. I-LPI No. 45.

22. Mr. Arnold Petty, Assistant Director of Administration for the Bureau of Land Management, agreed with the characterization of the Interim Agreement as "in effect our escrow agreement." Testimony of Mr. Arnold Petty, Tr. 444.

23. Dr. John Haslem, expert witness for the United States, gave his opinion that the Federal Government treated the account under the impoundment provisions of the Interim Agreement in the same manner as a bank would treat an es-

crow account. Testimony of Dr. John Haslem, Tr. 836.

24. The only federal negotiator to testify, George S. Swarth, admitted that there was a fiduciary relationship between the United States and Louisiana with regard to the impounded funds [Dep. Tr. 9]:

> "Q. Did the Federal representatives make any representations that they were accepting a fiduciary relationship in impounding these funds, the responsibilities of a fiduciary?
>
> "A. Well, the Treasury was to hold this as an impounded fund under an obligation to pay it as the case should ultimately be decided. That was I take it a fiduciary responsibility."

25. United States' officials represented to California that the identical deposit fund account used subsequently in this case was in the nature of a trust. La. Exh. 9-LPI Nos. 152, 153, 154, and 155.

a. Everett W. Mattoon, Assistant Attorney General of California, wrote to Thomas H. Kuchel, California State Controller, on March 13, 1951 in which he quotes *verbatim* the following portions of a telegram which had been received from the Fiscal Assistant Secretary for the United States Treasury:

> " 'Reference to my letter February 23rd to State Controller and your telephone conversation with Mr. Heffelfinger of my office March 12. The Special Deposit Account held by Paul D. Banning, Chief Dis-

bursing Officer, *14F5709* Oil and Gas Deposits Submerged Lands Department of Interior, will contain funds deposited by the State of California *which funds so held will be in the nature of trust funds* and will only be available for use by the Secretary of the Interior in accordance with the terms of the stipulations.' "

In his letter, Mr. Mattoon states:

"Mr. Heffelfinger explained that the reason the 'Special Deposit Account' was not designated as a 'trust fund' was that certain Federal restrictions made this unfeasible if not impossible."

And, the letter continues:

"It will be noted in the telegram that it is stated that the 'funds deposited by the State of California' in the special deposit account 'will be in the nature of trust funds and will only be available for use by the Secretary of the Interior in accordance with the Stipulations.' " La. Exh. 9 - LPI No. 155. (Emphasis added.)

b. Mr. George Swarth, witness for United States, when asked whether Account 14F5709 would be considered as a trust fund, replied [Dep. Tr. 39]:

"A. Yes, it was a trust fund."

c. Special Deposit Account 14F5709 and Deposit Fund Account 14X6709 (used in this

Louisiana case) are identical. Thus, on June 17, 1953 the Assistant Attorney General of California requested the Secretary of the Interior to return California's money which had been placed in "a special trustee account fund, designed *14X6709 - Oil and Gas Deposits Submerged Lands, Bureau of Land Management.*" (Emphasis added.) La. Exh. 9 - LPI No. 161; U.S. Exh. 47.

d. The accounting report from the United States in returning to California the money received under the August 21, 1950 Stipulation, recites:

> "Statement of Tide and Submerged Land Mineral Lease Royalties Impounded Under Stipulation (U.S. vs. California) of August 21, 1950, by Depository - October 1, 1950 through May 22, 1953.
>
> "(a) ON DEPOSIT WITH THE UNITED STATES GOVERNMENT
>
> Depository Account: *14X6709* - Oil and Gas Deposits, Submerged Lands, Bureau Land Management" (Emphasis added.) U. S. Exh. 47.

26. The pressure placed on Louisiana negotiators to reach agreement in order to lift the injunction, increased the reliance placed by them upon the representations of federal officials, as Mr. C. J. Bonnecarrere testified. [Tr. 116-117; 128-129]:

> "Q. Did they indicate or put any pressure upon Louisiana to place trust and confidence in the United States Government that they would

not in the normal arm's length dealings?

"A. I would think that we would place implicit trust in the negotiators and those representing the Federal Government as we would with our own. I think it was — I think it would indicate to me, sir, if I may use that term, it would indicate to me a sort of joint venture if you will."

***

"Q. Did you place trust in and confidence in the Federal Government?

"A. Yes, to the greatest extent, and still do.

"Q. Did you expect that if they profited by the use of your money that you would get your share?

"A. Yes sir. And still do."

EXCEPTION 2

The United States used Louisiana's money for its own purposes and without any authority under the Interim Agreement.

27. The United States admitted that Louisiana's money was available for unrestricted use by the Federal Government in formal admissions filed in response to Louisiana's First Request for Admissions:

a. "The United States admits that the cash representing revenues from disputed lands, received by the United States pursuant to the Interim Agreement of October 12, 1956 (1) was deposited in the Federal Reserve Bank, New Orleans, a number of other banks designated as Federal depositories for the United States Treasury, and the office of the United States Treasury, Washington, D.C. and (2) became part of the general account of the Treasury [sic] of the United States." Response by the United States to Louisiana's Request No. 1, January 26, 1977. *See also* United States' Response to Interrogatory No. 8. Brief in Support of Exceptions p. 30.

b. "The United States admits that the actual cash representing revenues from disputed lands, when deposited in the general account of the Treasury of the United States, was immediately available to meet any authorized cash needs of the Government whatsoever." Response by the United States to Louisiana's Request No. 2, January 26, 1977.

c. "The United States admits that the actual cash deposited in the general account of the Treasury of the United States, including cash representing revenues from disputed lands, is subject to disbursement by checks drawn on the United States Treasury by Government disbursing officers in order to make payment of Government obligations as authorized by law." Response by the United States to Louisiana's Request No. 3, January 26, 1977.

28. Dr. Donald Woodland introduced the chart shown on page 23 entitled "Flow of Escrow Funds" to demonstrate what happened to the Tidelands money.

29. Mr. John Carlock, Fiscal Assistant Secretary for the United States Treasury, testified on cross-examination that no cash was deposited to the Deposit Fund Account Number 14X6709 [Tr. 397-399]:

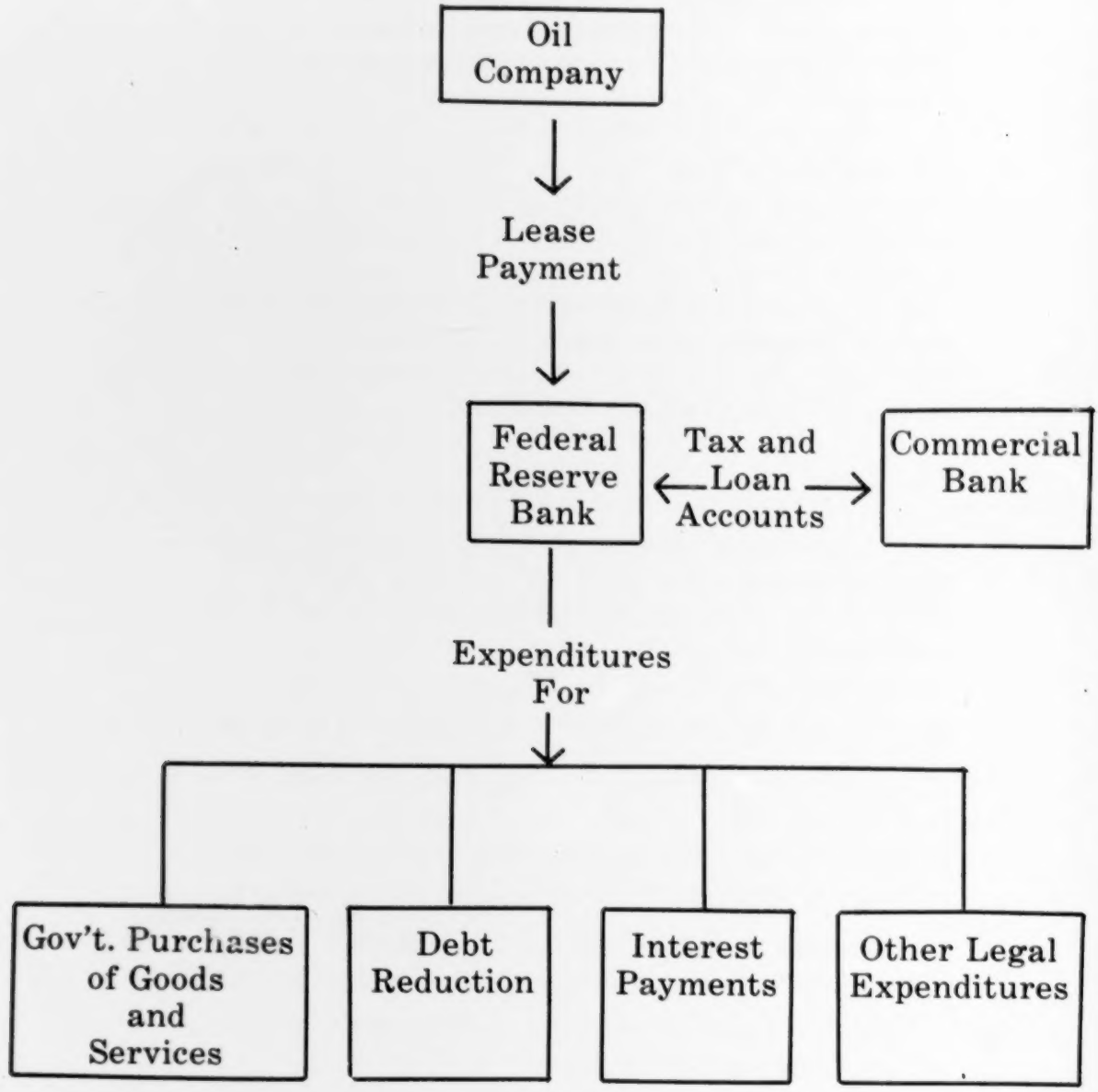
"Q. Mr. Carlock, I believe that you stated on one or two occasions that the funds from the Tidelands Account or the money from the Tidelands Disputed Area or the funds from the Tidelands Disputed Area are deposited in the Deposit Fund Account Number 14X6709.

"A. Yes, sir.

"Q. In making that statement you were not inferring, were you, that the actual revenues were deposited in that account?

"A. The actual cash went into the General Account of the Treasurer.

FLOW OF ESCROW FUNDS



La. Exh. 1-LPI No. 41.

"Q. You agree, then, with the Admissions made in the testimony which you have previously heard, that the actual cash revenues, the monies, go into the General Account of the Treasurer?

"A. Right.

***

"Q. Now as to this deposit fund account that you referred to, you agree, I take it, with the previous testimony that has been presented, that that is a liability account?

"A. Yes.

"A. And there is not a dollar bill that goes through that account?

"A. No."

30. Letters of officials of the United States establish that Louisiana's money was used by the United States:

a. The letter of January 19, 1972 from Mr. David Mosso, Commissioner of Accounts, Treasury Department to Senator Long, which letter was referred to by the United States in response to Louisiana's Interrogatory No. 8, states:

> "The escrow account with which you are concerned is that bearing the Treasury symbol 14X6709, entitled 'Deposits, Outer Continental Shelf Lands Act, Agreement October 12, 1956, Louisiana'; the account

is classified as a Department of the Interior deposit fund account. A brief statement concerning that account may be helpful.

***

"In the case here in question, the cash was placed in the general account of the Treasurer of the United States where it was immediately available to meet any cash needs of the government whatsoever.

***

"The collections relating to the Louisiana Tidelands escrow funds in question are deposited by the Department of the Interior into a Federal Reserve bank and become part of the cash comprising the general account of the Treasurer, U.S. The cash deposited in accounts in the name of the Treasurer of the United States is subject to checks drawn on the Treasurer of the United States by Government disbursing officers to make payments of the Government's obligations as authorized by law.

***

"However, at the time of the deposit of the Tidelands escrow fund collections by the Department of the Interior, the agency makes an entry in its accounts for the deposit fund liability of the Government, documented by a certificate of deposit similar to the attached . . . . Each month the agency reports to the Treasury's

Bureau of Accounts the total amount deposited to account 14X6709 for entry into the Department of the Treasury's central summary accounts. Thus, the end result of these deposits is an increase in the Government's cash and an offsetting increase in deposit fund liabilities of the Government." (*See also* Tr. 197.) La. Exh. 1 - LPI No. 22.

b. The letter dated December 22, 1971 from Mr. David Mosso, Commissioner of Accounts, Treasury Department, to Mrs. Lloyd of the Office of the General Counsel, Department of the Treasury, which letter was referred to by the United States in response to Louisiana's Interrogatory No. 8, states:

> "The account of the Treasurer, U.S. is credited with general fund receipts (e.g., taxes), special fund receipts, deposit fund receipts, etc. *and these receipts are used to finance general fund expenditures and all other legal payments authorized by law.* To the extent that such receipts are insufficient to finance all legal payments, the Treasury borrows additional amounts through the sale of public debt securities and those proceeds are also credited to the Treasurer's account. As checks come in for payment, they are charged to the Government's bank account regardless of whether they are classified for accounting purposes as general fund expenditures, special fund expenditures, deposit fund expenditures, repayments of public

debt principal or whatever." (Emphasis added.) La. Exh. 1-LPI No. 20.

c. The letter of January 10, 1972 from Mr. David Mosso to Senator Ellender which is La. Exh. 1-LPI No. 21, is identical to the letter to Senator Long quoted in paragraph (a) *supra* and identified as La. Exh. 1-LPI No. 22.

d. The letter of December 13, 1971 from Mr. Lawrence N. Woodworth, Chief of Staff, Joint Committee on Internal Revenue Taxation, Congress of the United States to Senator Long states:

> "You and Senator Ellender have inquired of me the manner in which *escrow accounts* are handled by the Federal Government.
>
> "Specifically, the *escrow account* which I understand you have reference to is the account relating to the Tidelands dispute by the State of Louisiana and the United States. This account is administered by the United States under the agreement reached by the parties. This means that the cash received from the oil leases in the disputed Tidelands area are covered into the general account of the Treasurer of the United States.
>
> "At the time the cash is paid into this account an equal amount is credited to the *escrow or deposit account*. This constitutes a liability of the Federal Govern-

> ment. Cash paid into the general account is available for expenditure for any proper governmental purpose. *The effect of this is to make funds paid into the general account unrestricted* (except for general rules of law) *as to the purposes for which the moneys can be spent, in the same manner in this respect as if there were no escrow account.* (Emphasis added.)
>
> ***
>
> "To summarize, while amounts held in *escrow* by the United States are not classified as budgetary receipts, they are available for expenditure for general Governmental purposes." La. Exh. 1-LPI No. 19. See also Tr. 198.

31. The testimony of Dr. Donald Woodland, Dean of the College of Business Administration at Louisiana State University, who was qualified as an expert witness in banking and finance, showed, by an analysis of United States Treasury documents that the Tidelands funds including Louisiana's money was actually used by the United States:

a. La. Exh. 1-LPI No. 42, an exhibit showing the daily change in the cash balance of the United States Treasury by deposits and withdrawals for a specific period of time deemed to be typical of the period from 1956 to the present, was described by Dean Woodland as follows [Tr. 213-216]:

"Q. Just as an example, each day, over the years over the, perhaps, past 20 years or more, there has been more withdrawals than actual money taken in; there has been more money spent than taken in, is that correct, by the Federal Government?

"A. That is right. The Federal Government has run a deficit for this period, so I think by definition, they have spent more money than they have taken in.

"Q. The only way that deficit can be corrected is by borrowing money, is that right?

"A. That is right.

"Q. Would you say that this particular exhibit, particular period of time shown on this exhibit is typical?

"A. Yes, sir, I would say it is typical.

"Q. Of how the Federal Government has been operating in red all this time as far as money is concerned?

"A. Well, I say it would be typical of the Treasury's daily activities in and out of its account at the Federal Reserve Bank, yes, sir.

"Q. Now, that being the case, does that indicate to you that since they spent all the money they had, that it had, of necessity, to include Louisiana's share of the Tidelands funds?

"A. Yes, sir."

b. La. Exh. 1-LPI No. 48, an exhibit showing an increase in the public debt every year since 1956 except two years, was explained by Dean Woodland as follows [Tr. 217-218]:

> "Q. When you take into account Exhibits 42 and 48, at what conclusion do you arrive?
>
> "A. This would indicate that the Treasury used all the money that it had available to it and borrowed additional amounts.
>
> "Q. If the United States Treasurer, as indicated by your study, as reflected on these exhibits, did, in fact, use all of the money which came from the disputed Tidelands area, and if they did, in fact, use Louisiana's share and had to borrow more money instead, is it your opinion that by using Louisiana's money, that they saved the necessity of borrowing more money?
>
> "A. Yes, sir.
>
> "Q. It reduced the borrowing needs?
>
> "A. It reduced the borrowing needs."

c. La. Exh. 11-LPI Nos. 182 and 183, an exhibit showing the velocity or average rate of monthly turnover of funds in the Treasury, was further evidence indicating to Dean Woodland that Louisiana's money was in fact used [Tr. 906-908]:

"A. 182 is a tabulation for the average monthly balance of the United States Treasury at the Federal Reserve Bank computed on an average daily basis taken from the daily statements of the Treasury and also the total monthly expenditures of the U.S. Treasury as taken from the Treasury bulletin.

"For example, it indicates that in February for '76 the Treasury had an average daily balance of 10 billion, 732 million.

"They spent that month 90 billion, 667 million.

***

"Q. Have you calculated the rate of turnover or the rate of velocity?

"A. (By the Witness) You can compute the average turnover several ways using total monthly expenditures or doing it on a monthly basis.

"I did it on a monthly basis and the turnover would average on a monthly basis, annualized about 113 times per year.

***

"Q. May I ask this: Is the year 1976 typical as to other years since 1956 with a variation, perhaps, in numbers of turnovers?

"A. I would say it would be typical. Of

course, there would be considerable variations in rates of turnover.

"But the Treasury does do a very efficient job in maintaining its cash balance, so you would have a high turnover, naturally.

"Q. Well, now, in the amount of turnover, the rate of turnover would vary from year to year, but would it always be substantial?

"A. Yes, sir."

d. La. Exh. 11-LPI No. 184, is a copy of the U.S. Treasury Bulletin issued December 1976, showing a summary of fiscal operations for the years 1968 through 1976. Dean Woodland explained this exhibit as describing the way in which the public debt was amassed and financed. Tr. 908-914. Dean Woodland pointed out that footnote 9 to Column 13 included deposit funds as indicating the reference source from which cash was used to finance the public debt. After describing the exhibit in detail, Dean Woodland concluded [Tr. 913-914]:

"Q. What is your conclusion, then, Dr. Woodland, from the examination of this document with respect to whether or not the United States did, in fact, use the Tidelands' money?

"A. My conclusion would be that the

funds were in fact, deposited in the general account of the U.S. Treasury and were part of the funds that were used to balance the budgetary receipts and outlays."

32. The Louisiana negotiators testified that there was no agreement that the United States could have the use of Louisiana's money:

a. Mr. Edward Carmouche testified [Tr. 55]:

"Q. Specifically, was anything ever said; was any agreement ever entered into or any understanding ever had to the effect that the United States could commingle the funds with its own money?

"A. They could not. They were prohibited from doing so under this Agreement.

"Q. Was there anything ever said to indicate as to whether they need not invest the money?

"A. In the entire period from 1956 to 1962 in which I actively participated in the Tidelands litigation and the Interim Agreement, nothing was said.

"Q. Then, during those negotiations leading up to October 12, 1956, were you ever told that the United States could not invest the money?

"A. Never.

"Q. Was there any understanding or

agreement as to whether the United States could have free use of the money which was held in escrow?

"A. No sir, there was no such agreement."

b. Mr. C. J. Bonnecarrere testified [Tr. 129]:

"Q. Did you expect that if they profited by the use of your money, that you would get your share?

"A. Yes, sir. And still do."

On cross-examination, Mr. Bonnecarrere said [Tr. 136, 138]:

"Now, it certainly was not, and I must say this in all good conscience, that it certainly was not in my opinion nor any [sic] anyone else's, I should think at that table, that anybody would have any free use of monies, though."

***

"I would put it this way, that if someone benefited financially because of the use of monies which actually were later determined to belong to me, I would think that I should be entitled to my fair share of those returns. That is all I can say. As a matter of equity."

c. Mr. Marc Depuy testified [Tr. 163]:

"Q. (Interposing) The Federal Govern-

ment never asked Louisiana's consent to use the money in the manner which they did?

"Let me put it this way. I guess you may not be familiar with the manner in which they used it.

"A. There was no agreement that Louisiana made that would allow the United States to use the money."

On cross examination, Mr. Dupuy said [Tr. 173, 175]:

"A. . . . But I think that whatever the obligations of the United States were, were the same as the obligations of an escrow holder. And we did not agree, at any point in time, ever, that the United States should use the money for its sole and exclusive benefit."

***

"Q. Mr. Dupuy, did anybody from the Federal side of the table during the negotiations ever explain to the Louisiana negotiators how they were using the money or intended to use the money?

"A. No, they did not."

33. Louisiana negotiators were not familiar with the manner in which the funds were handled in the California case as indicated by the following testimony of Mr. Edward W. Carmouche [Tr. 93-94]:

"Q. Were you familiar with a similar stipulation which had been reached with the state of California?

"A. I am not sure.

"Q. The stipulation to impound funds derived from disputed areas.

"A. I am not sure that had been done at that time.

"Q. So, you were not familiar, or if you were, you don't recall?

"A. I not only don't recall, I don't think it had happened at that point in time.

"Q. The original stipulation with California was in 1947. It was amended several times.

"A. I am not aware of it."

EXCEPTION 3

The United States had the duty to invest the Tidelands money for the benefit of both parties.

34. The procedure for handling the Tidelands money was set up prior to the confection of the Interim Agreement for the purpose of adhering to General Accounting Office procedures, not for the purpose of complying with the agreement as is pointed out by the following excerpt of the decision of the Comptroller General of the United States issued on July 31, 1956, in response to a request by the Secretary of the Interior:

> "Reference is made to letter dated July 12, 1956, from the Administrative Assistant Secretary of the Interior, requesting authorization for withdrawal from the General-Account Receipt accounts. '141711 Rent on Outer Continental Shelf Lands' and '142114 Royalties on Outer Continental Shelf Lands,' in the Treasury of the sum of 59,923,728.28 and its redeposit in the Treasury to the Special Deposit Account '14X6709 Oil and Gas Deposits, Submerged Lands, Interior' (symbol '1446709' cited in letter). The sum involved includes all bonuses, rentals, and royalties received on account of oil and gas leases issued by your Department pursuant to section 8 of the Outer Continental Shelf Lands Act, 67 Stat. 468, and the leases are for locations situated wholly or partly within a tidelands area over which there is a dispute between the State of Louisiana and the United States as to ownership. The request to withdraw the funds and redeposit them to a special deposit account is made for the reason

that, because of the dispute which existed at all times, the funds should not have been deposited in General Account Receipts.

***

"Accordingly, authority is granted for the withdrawal from the General Account receipt accounts '141711' and '142114' of that portion of the amounts received from leases of locations in the area in dispute." La. Exh. 1 - LPI No. 27.

35. Mr. John Carlock, Fiscal Assistant Secretary for the United States Treasury, testified that the deposit fund account was set up pursuant to Treasury Department policies and not by requirements of the Interim Agreement [Tr. 405-406]:

"Q. Inasmuch as the arrangement for your deposit fund account was set up about two months before the Interim Agreement was entered into, that must have been set up pursuant to the policies of the Treasury Department and not the requirements of the agreement.

You agree with that, don't you?

"A. Right."

36. *A Dictionary for Accountants* by Eric L. Kohler defines "impound" to mean "to seize and hold in protective custody . . . cash and other assets." Testimony of Jerry E. Walker, Tr. 281.

37. The deposit fund account 14X6709 was neither set up as a result of the Interim Agreement

nor satisfied the requirements of the Interim Agreement as stated in the following testimony of Jerry E. Walker, a certified public accountant and an expert witness in Accounting and Finance [Tr. 296-297]:

> "Q. My question to you Mr. Walker, is, first of all, when the Deposit Fund Account was set up two months before the Interim Agreement was executed, it would be quite a mathematical certainty that they could not have taken into consideration the Agreement, the Interim Agreement, is that correct?
>
> "A. I would presume so. Of course, it could have been drafted and processed. But the Interim Agreement had nothing to do with the decision to change to a Deposit Fund Account. As I understand it, it was the GAO which initiated that.
>
> "Q. Very well. And if the Interim Agreement required, as one of the duties of the escrow agent, that the money be held intact, is it your opinion that that requirement was satisfied by the manner in which the Federal Government held the money?
>
> "A. I believe it did not satisfy the requirement. The use of the term 'intact' and 'impoundment in a separate fund' means to me something is being done with physical assets, whether it be cash or securities. That is restricted and that was not done."

38. The testimony indicated that the combination of the words "impounded," "held intact" and "separate account" require a prudent investment

and administration of the fund [Tr. 900-901, La. Exh 1-LPI No. 6]:

> "Q. Special Master: But those mean income producing, by inference?
>
> "A. The combination of those, I believe, produces a situation where special responsibilities are bestowed on the holder of those funds, that they have an obligation then to do something for those funds.
>
> "Again, I hate to be repetitive, but the fact that those words are meaningless if they don't have some kind of special meaning, that a new responsibility is held by the United States Government."

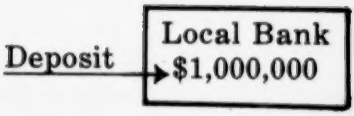
39. The Tidelands money could have easily been invested in accordance with the Interim Agreement as explained by Mr. Walker in his explanation of Louisiana Exhibit 1 - LPI No. 49, a chart he devised showing "what should have happened" to the Tidelands money [Tr. 260-267]:

> "Q. Now, Mr. Walker, will you please state what this document is?
>
> "A. First of all, this is obviously a different document than the one that is in evidence, but it is a faithful reproduction of what you have as LPI No. 49.
>
> "Q. This is an exact enlargement of LPI No. 49?
>
> "A. Right.
>
> "Q. That was prepared by you or under your direction and control?

EXAMPLE 1
What Should Have Happened

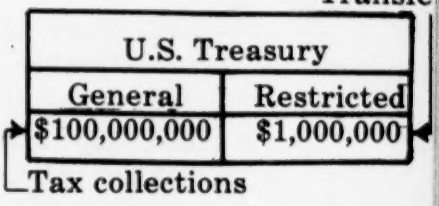
Step 1

Payments were made by the oil companies into local banks.



Step 2

The monies were transferred by the U.S. Government to the U.S. Treasury where they *should* have been deposited to a separate restricted account (similar to a lawyer's escrow account).



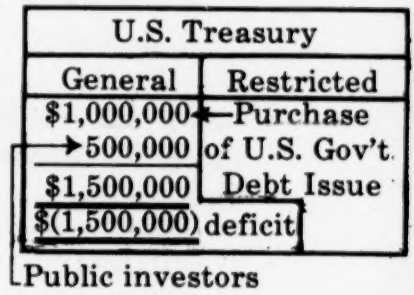
Step 3

Assume that the U.S. Government paid its bills (payroll, purchases, etc.) at a cost which exceeded the monies on hand (from tax collections and the like) by $1,500,000.

U.S. Treasury	
General	Restricted
($1,500,000)	$1,000,000

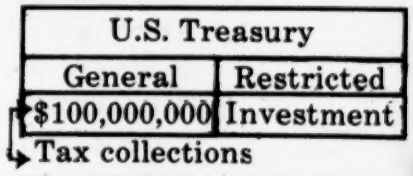
Step 4

In order to cover the expenditures, the U.S. Government would have to issue debt to borrow the additional monies. The restricted account would then have been made productive by using those monies to purchase a portion of the U.S. Government debt issue.



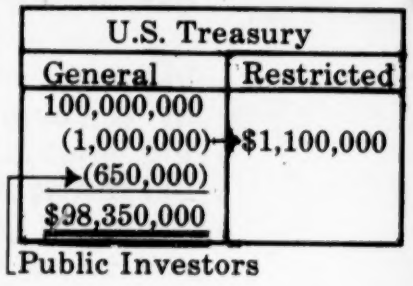
Step 5

The U.S. Government would receive additional tax and other collections.



Step 6

The U.S. Government would repay its borrowings (with the agreed upon interest).



Step 7

The U.S. Government would pay its bills at a cost which exceeded the monies on hand and the borrowing cycle would begin again.

La. Exh. 1-LPI No. 49.

"A. That is correct.

"Q. Will you please state in general what it shows and then describe the various steps that you have indicated?

"A. In general, for example, one is intended to show how a method by which the Interim Agreement could have been complied with and the funds could have been impounded and held intact and still those funds could have been made productive through investment.

"Now, admittedly, the example uses hypothetical numbers. There is no relationship to any actual transactions whatsoever. And the magnitude of the numbers are far different than we would be dealing with than the General Fund of the Treasury itself.

"If you will bear with me, I think it will illustrate my point.

"Step 1 at the top is simply an indication of the initiative step of the transaction, that is, that the payments were made by the oil companies into the Depository and eventually into the Federal Reserve Bank. And in this case, for illustration purposes, we have assumed a deposit of ten million dollars made by the oil companies.

"In Step 2, we introduce a box on the right, and by 'the box,' I mean the entire box here indicating the United States Treasury. We have broken it down into two areas, the General Funds of the Treasury and what I have referred to as Restricted Funds of the Treasury where I believe the moneys from the Tidelands should have actually been residing.

"Now, at this point the funds are held idle and we are looking at this as an initial transaction.

"So, to further describe Step 2, that is the step at which the moneys are transferred from the Depositories where they were initially deposited into the Accounts of the U.S. Treasury and they are recorded on those accounts.

"As I have said in the notes to the side, that I look upon this as similar to a lawyer's escrow account, or the escrow account of the type we were talking about and heard discussed yesterday.

"At the same time, in Step 2, we show a collection of a lump sum amount, and for illustration purposes, we have assumed one hundred million dollars coming in from other sources into the unrestricted general funds of the Treasury. And that would be by tax collections, as an illustration. It could be from proceeds from borrowings; it could be other revenue sources of the Government.

"Step 3 we do not have a box by because Step 3 is intended to illustrate a decision point that is constantly going on throughout the fiscal process or fiscal management processes of the Government, and that is the cash planning, a need for borrowing for the future.

"That step simply indicates that at some point the Government must determine that they have so many obligations to pay and they have so much cash on hand or resources available to generate cash to satisfy these obligations when they come due.

"For this illustration purposes again I overly simplified, but we have assumed that the Gov-

ernment looks at their future obligations and what they have to satisfy those, and we come up with a fifteen million dollar short fall. And the way they satisfy those obligations is by going out into the market and borrowing through the issuance of securities.

"SPECIAL MASTER: Excuse me.

"THE WITNESS: Yes, sir.

"SPECIAL MASTER: And you refer there to an excess of obligations over moneys on hand from taxes collected and the like. I take it that is in your box there and would be general funds.

"THE WITNESS: That is correct. That is the General Fund of the Treasury.

"SPECIAL MASTER: Not including the restricted funds?

"THE WITNESS: That is correct.

"So, at this point, the Government having made the decision that they need to borrow fifteen million dollars, goes out into the market, offers the securities to the general public. And at the same time this gives them the opportunity for the restricted funds to be made productive. And we are assuming that this is at the point when the prudent agent charged with the custody of those restricted funds decided that they should be made productive. With the Government issuing securities at this time, they take advantage, in my illustration, of purchasing ten of that fifteen million dollars worth of securities. And the cash that belongs in the fund, in effect, is exchanged for a security which would be interest-bearing.

"And also at the same time, the remaining five million dollars is offered to the general public as investors to bring it up to the total of fifteen million dollars.

"So, at the end of Step 4, we find ourselves in the position where the Treasury has at that point at least satisfied their needs for cash to fulfill the retirement of their obligations and also the restricted funds have now been put to productive use.

"And step 5 is just a regular step that we would expect to find, and that is additional collections by the U.S. Government of a routine nature. That is, they collect from tax sources or other sources one hundred million dollars more in my example here.

"So, we find the Treasury replenished with cash and we find the restricted fund continuing to hold the interest-bearing security.

"In Step 6, it comes to the point at which the obligations, or rather, the security that is held by the restricted funds, comes due and at that point the general funds of the Treasury must be brought into use to satisfy the retirement of that security and also pay the interest for the earnings on the security.

"And for our example here, we have assumed that five per cent was earned on it without regard for what period it was held. But for illustration purposes here, we assume that five hundred thousand dollars was earned on that ten million dollar investment. Therefore, the U.S. Treasury would be responsible for retiring that security, to replenish the restricted funds with the amount of principal and five

hundred thousand dollars worth of interest, while at the same time retiring the other obligations of a similar nature that were issued to the general public of five million dollars plus two hundred fifty thousand dollars worth of interest.

"So, that ends the cycle, except Step 7 indicates that the cycle would be expected to continue in this same kind of arrangement over and over again, and becoming more complicated, obviously, as more money was involved and more securities.

"SPECIAL MASTER: What you are saying, in effect, is that they could either use the money and pay interest or not use it and not pay interest, but they couldn't use the money and not pay interest?

"THE WITNESS: That is right. As I said, for a reasonable period of time they could hold the funds.

"SPECIAL MASTER: And avoid interest, but that they should be restricted?

"THE WITNESS: That is right.

"Q. (By Mr. Kellough) Referring to Paragraph 6, for example, when the securities mature, the money is returned to the restricted account and the interest paid on that security then becomes part of and an increment to the restricted account, is that correct?

"A. That is correct.

"As I show in the example, the restricted fund now, instead of the original ten million dollars,

has had added to it the five hundred thousand dollars worth of earnings.

"SPECIAL MASTER: And thereafter, if they withdrew it again on an interest-bearing basis, they would pay interest on the interest that had previously been collected?

"THE WITNESS: That is correct.

"SPECIAL MASTER: As well as the principal amount?

"THE WITNESS: That is correct.

"Q. (By Mr. Kellough) And the security is to be extended and repaid so long as whatever interest is credited would eventually get back in this restricted fund?

"A. That is correct.

"Q. So that at the date of distribution when a determination is made as to who owns the lands and how the restricted funds should be disbursed, the disbursement would include increments which have been accumulated over the years by the procedure you described?

"A. That is correct."

40. The law requires a trustee to prudently invest trust funds and he is chargeable with the amount of income which normally accrues from proper trust investment if he fails to do so:

a. In a comment to §180 of the Restatement of Trusts, the obligation to invest trust funds is noted:

"d. Excessive deposits. Although a trustee can properly deposit trust funds in a bank for the purpose of making the funds available from time to time for the payment of expenses or pending investment or distribution, he may incur a liability where he leaves an excessive amount of money on deposit for an unreasonably long time, instead of withdrawing and investing it. In such a case, if the deposit is not at interest and justifiable as an investment, the trustee is liable for interest lost by the failure to invest. *See* §§207, 211."

b. A case squarely in point on the legal duty of the trustee to invest trust funds is *Langford v. Shamburger*, 392 F. 2d 939 (5th Cir. 1968). One of the issues in that case involved the failure of trustees to put trust funds out at interest. It had been established that a large amount of cash — apparently more than $100,000 — was deposited in a trust checking account and left idle for seven years. In holding that the failure to invest these funds constituted a breach of trust, the court said (quoting from the Texas Court of Civil Appeals in a companion case-417 S.W. 2d at 444-445):

"It is also incumbent upon the trustee to put funds to productive use and the failure to do so within a reasonable period of time can render the trustee personally chargeable with interest."

The court went on to say:

> "The trustee's failure to remove $100,000 from a checking account to a savings account is in the nature of an intentional omission which cannot be excused by a clause limiting his liability to matters of gross negligence. Accordingly, we hold that as a matter of law the trustee's estate is chargeable with interest computed at three per cent on trust funds left in a checking account for seven years unless it be determined on remand that the beneficiaries acquiesced." 392 F. 2d at 948.

c. Another case squarely on point on the issue of the trustee's duty to invest is *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.C. 1971). That was a derivative class action brought on behalf of coal miners with present or future rights in a welfare fund managed by trustees of an irrevocable trust established by the Labor Management Relations Act. The court held that it was a breach of fiduciary obligation to permit large accumulations of cash to remain uninvested. The court pointed out:

> "The precise duties and obligations of the trustees are not specified in any of the operative documents creating the Fund and are only suggested by the designation of the Fund as an 'irrevocable trust.' " 329 F. Supp. at 1094.

But then the court said:

> "The congressional scheme was thus designed not to alter, but to reinforce 'the most fundamental duty owed by the trustee': the duty of undivided loyalty to the beneficiaries. 2 Scott on Trusts §170 (3d ed. 1967). This is the duty to which defendant trustees in this case must be held." 329 F. Supp. at 1095.

As to the obligation to invest the trust funds, the court said:

> "The major breach of trust of which plaintiffs complain is the Fund's accumulation of excessive amounts of cash. A basic duty of trustees is to invest trust funds so that they will be productive of income. [citations] It is contended that the trustees failed to invest cash that was available to generate income for the beneficiaries and in total disregard of their duty allowed large sums to remain in checking accounts at the Bank without interest."
>
> ***
>
> "The beneficiaries were in no way assisted by these cash accumulations, while the Union and the Bank profited; and in view of the fiduciary obligation to maximize the trust income by prudent investment, the burden of justifying the conduct is clearly on the trustee." [citations] 329 F. Supp. at 1095-1096.

The court then rejected the explanations to justify the failure to invest the trust funds and concluded:

"The trustees well knew that cash deposits at the Bank were unjustified. It was a continuous and serious violation of the trustees' fiduciary obligation for them to permit these accumulations of cash to remain uninvested." 329 F. Supp. at 1098-1099.

d. *Bartlett and Company, Grain v. Commodity Credit Corp.* 307 F. 2d 401 (8th Cir. 1962) involved funds held by a warehouseman and derived from flood damage insurance pending a determination of the interests of various parties in the money. The agreement provided, among other things, that the warehouseman would hold the funds as trustee in a special account and went on to provide that the funds "will be maintained in a separate account." In January 1958, the warehouseman received uninvested cash which was immediately commingled with the warehouseman's general funds. At all times, the warehouseman recognized that Commodity was entitled to at least $179,351.47 and carried that amount as a liability on its books.

The court held that Commodity's share of the insurance proceeds constituted a trust fund, and that it was entitled to recover interest from the date of the commingling in lieu of accounting for the actual increments and profits. The court said:

> "In making its decision the District Court applied the principle, recognized in Missouri as elsewhere, that where a trustee wrongfully commingles trust funds with his own property, and where there is no evidence as to the profits earned by the use of the funds after the commingling, the Court, in its discretion, may, in lieu of ordering an accounting, simply charge the trustee with interest on the trust funds at the legal rate, the trustee being permitted to retain the profits, if any, and being required to bear the loss, if any, resulting from the use of the funds. See *Buder v. Fiske*, 8 Cir., 174 F. 2d 260, and authorities there cited." 307 F. 2d at 408-409.

During a period of time when the profit was ascertainable, the court held that the trustee should account for the actual profit made. On this point, the court said:

> "The amount of the actual yield of the bills is known, and the claim of Commodity for the period now in question should be limited to its pro rata share of the yield." 307 F. 2d 409.

41. The subject of payment of interest on the impounded fund was never discussed during the negotiations:

a. Mr. Carmouche, a negotiator for Louisiana, testified as follows [Tr. 70-71]:

> "SPECIAL MASTER: Was the question of interest ever discussed pro and con?

"THE WITNESS: (Mr. Carmouche) Yes, sir. We were going to put it at interest in our banks, and the Federal Government wouldn't allow it.

"SPECIAL MASTER: I mean, interest, under the Agreement which provided that the Federal Government would be custodian.

"THE WITNESS: No, sir. Because at the first oral meeting that we had with the Department of Interior, they let us know that was not possible.

"SPECIAL MASTER: They said they weren't going to pay interest on it?

"THE WITNESS: No, they said they weren't going to escrow it in any Louisiana banks; and we might as well forget that, that they would handle the escrow.

"SPECIAL MASTER: None of you said, 'Well, if you are going to be custodian of it, you are going to owe us interest'?

"THE WITNESS: No, sir.

"SPECIAL MASTER: And, obviously, they didn't inject that; because it never was brought up.

"THE WITNESS: That is correct."

b. Mr. Swarth, a negotiator for the United States, testified as follows [Dep. Tr. 7-8]:

"Q. Do you recall whether the payment of interest on impounded funds was discussed at the meetings which led to the 1956 Agreement?

"A. So far as I can recall, it was not.

"Q. Do you remember whether investment of the impoundment fund was ever discussed?

"A. No., I do not recall that it was."

42. Louisiana negotiators testified that there was no understanding or agreement that the United States could have free use of Louisiana's money:

a. Had the United States insisted that it could use the money, Louisiana would not have agreed to it. [Tr. 163-164]:

"Q. Now let me ask you this. Counsel likes to keep asking whether or not there was any agreement between the parties that the Federal Government would have to pay interest.

He likes to ask whether or not we asked the Federal Government how they were going to use the money.

Let me ask you this, Mr. Dupuy. Did anybody in the Federal Government ask Louisiana if it would be all right for them to use Louisiana's money?

"A. Certainly not. As your Honor observed this morning, 'had Louisiana said and insisted that interest be paid in the Interim Agreement, the United States would not have agreed to it.' And by like token, had the United States insisted that it could use the money, Louisiana would not have agreed to it. So, both parties, in trust with each other —

"Q. (interposing) The Federal Government never asked Louisiana's consent to use the money in the manner which they did?

Let me put it this way. I guess you may not be familiar with the manner in which they used it.

"A. There was no agreement that Louisiana made that would allow the United States to use the money.

***

"Q. Mr. Dupuy, did anybody from the Federal side of the table during the negotiations ever explain to the Louisiana negotiators how they were using the money or intended to use the money?

"A. No, they did not."

b. The details of the escrow were in fact never discussed in the negotiations either with regard to interest or with regard to the use of the Tidelands funds [Tr. 102-103]:

"SPECIAL MASTER: What you are saying, if I understand you, is you recognized that if you put a requirement for the payment of interest in the Agreement, the United States would not have agreed to it?

"THE WITNESS: Yes, sir.

"SPECIAL MASTER: Therefore, you omitted that, got them to agree to it with the tacit understanding that there was a legal obligation.

"THE WITNESS: With the hope on our part that equity would be followed, and that the general obligation of a fiduciary or trustee would be met.

"SPECIAL MASTER: So, you might say, 'Mr. Reed, why didn't your people insist on a provision in there that interest would not be paid?'

"THE WITNESS: That is correct. There was no such provision."

c. Further testimony by Louisiana negotiators that there was no agreement that the Tidelands money could be used by the United States is excerpted *supra*, this Appendix, at pp. 33-35.

43. Contemporaneous notes by Mr. C. J. Bonnecarrere, one of the negotiators for Louisiana, made at the time of the negotiation meeting on July 2-3, 1956, demonstrate that all the negotiators

thought the Interim Agreement would be of short duration:

> "I neglected further to add that, in the discussion connected with a time interval for the proposed interim agreement, a period of possibly six (6) months to one (1) year was proposed, with the Louisiana delegation favoring one (1) year. In addition, it was stated that there might be a provision for review every six (6) months by Representatives of both parties." La. Exh. 1-LPI No. 6 at p. 11.

44. The Louisiana Legislature passed Concurrent Resolution No. 251 on June 6, 1967 providing in part as follows:

> ". . . WHEREAS, the said revenues and royalties have for a number of years been impounded by the Federal Government and are presently being held in an 'escrow' fund, and
>
> "WHEREAS, the Federal Government has not invested the said revenues and royalties and has refused to invest the said funds even though the State of Louisiana has made official request that the funds be invested and
>
> ***
>
> "Be It Further Resolved that the Legislature of Louisiana does hereby respectfully request and urge the above named officials to take such steps as are necessary to effect a prudent and effective investment of the funds now and hereafter so impounded, with a view to increasing the increment deriving both to the Federal Government and to the State of Louisiana.
>
> ***

> "Be It Further Resolved that copies of this resolution shall be transmitted to the Treasurer of the United States, the Secretary of the Interior of the United States, the Attorney General of the United States and the Solicitor General of the United States and to each member of the Louisiana Delegation in Congress." La. Exh. 12-LPI No. 179.

45. The answer to this resolution was made by Mr. John Carlock, Fiscal Assistant Secretary of the Treasury, in his letter to the Governor of Louisiana dated July 14, 1967 wherein he stated:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of statutory authority.
>
> ***
>
> "This response is being made after consultation with the Departments of Justice and Interior and on behalf of those Departments as well as the Treasury Department. I am sending copies of this response to the appropriate officials in the other Departments." La. Exh. 13-LPI No. 180.

46. Agents and officials of the United States had interpreted the Outer Continental Shelf Lands Act as providing authority for the United States to invest funds in the California case notwithstanding the denial of this fact to Louisiana authorities.

a. Prior to the passage of the Outer Continental Shelf Lands Act, the United States Assistant Attorney General wrote to the Comptroller of California explaining the United States' position that the California funds could not be invested. The letter is dated March 13, 1951 and refers to an explanation of Treasury Department policy given by Mr. Heffelfinger of the Fiscal Service, Treasury Department.

> "Mr. Heffelfinger explained that the reason the 'Special Deposit Account' was not designated as a 'trust fund' was that certain Federal restrictions made this unfeasible if not impossible. The designation 'trust fund' placed upon moneys in the United States Treasury cannot be appropriated or used except upon authority of an Act of Congress. It will be noted in the telegram that it is stated that the 'funds deposited by the State of California' in the special deposit account 'will be in the nature of trust funds and will only be available for use by the Secretary of the Interior in accordance with the Stipulations . . . .' " La. Exh. 9-LPI No. 155.

b. Regarding the stipulation proposed by the United States after passage of the Outer Continental Shelf Lands Act and subsequent correspondence between the United States and California, Mr. J. Lee Rankin wrote a letter to the Deputy Attorney General of California on February 11, 1954, in which he made the following representations:

"Last September you left with me a draft of a renewal of the stipulation between us. I understood at that time that California believed it desirable to continue the stipulations in view of the attacks on the validity of the Submerged Lands Act which were then contemplated. In view of the number of amendments which had been made to the original stipulation, we prepared a revision to incorporate all of the surviving provisions in one document. *This draft contained authority for the United States to invest the funds held by it.* We forwarded this draft to you on October 1. As your files will show, there was further correspondence with you on January 8 and January 12 of this year with respect to the investment of the funds. Now your letter of January 21 appears to indicate that the State Lands Commission does not believe it necessary to renew the stipulation, but that you are willing to amend the existing stipulation with respect to the investment of funds by the United States, if we so desire.

"It is my thought that the draft of the stipulation which we forwarded to you on October 1 would take care of the matter of investing the funds, and also would protect the situation pending the outcome of the litigation involving the constitutionality of the Submerged Lands Act." (Emphasis added.) La. Exh. 9-LPI No. 167.

c. Mr. John Carlock admitted on cross-examination that the Outer Continental Shelf Lands Act permits the United States

to enter an agreement to invest the Tidelands funds [Tr. 403-404]:

> "Q. The Outer Continental Shelf Lands Act authorizes the United States to enter into an agreement with the State of Louisiana for the settlement of the Tidelands controversy in general language and to impound monies from the disputed area.
>
> "Is there any language in the Outer Continental Shelf Lands Act that would prohibit the United States from investing the money or paying interest?
>
> "A. No, not at all.
>
> "Q. Well, then, isn't the authority from which the Interim Agreement is executed derived from the Outer Continental Shelf Lands Act?
>
> "A. Exactly.
>
> "Q. So if the proper interpretation of the Outer Continental Shelf Lands Act requires that the money be invested, the interest be paid, then you would have your authority, would you not, sir?
>
> "A. You would if the proper interpretation were set up that required it."

d. That the California correspondence amounted to a recognition by the United States that the Outer Continental Shelf Lands Act provided the necessary authority for the investment of the Tidelands

funds was admitted to on cross-examination by Mr. George Swarth, the only federal negotiator to testify [Dep. Tr. 44-45]:

"Q. And you recall that Mr. Bartelt, I believe in his letter and statement of the witnesses heretofore have stated that the Federal Government could not invest funds unless there was an agreement? [Note: Reference is made to a letter from the Fiscal Assistant Secretary of the Treasury to the Comptroller of California dated February 23, 1951, before the passage of the Outer Continental Shelf Lands Act. U.S. Exh. 49 and 85.]

"A. Yes.

"Q. Or unless there was a statute authorizing the agreement?

"A. Yes. The statute did not have to authorize the investment specifically. It simply had to authorize agreement.

"Q. And that came after the Outer Continental Shelf Lands Act in this document here (indicating)? This document is dated February 11, 1954. [Note: the Rankin letter].

"A. Yes, that is after the Outer Continental Shelf Lands Act.

"Q. So the Outer Continental Shelf Lands Act would constitute the authority for this agreement? [Note: the proposed California Stipulation].

"A. Oh, yes." (Notation ours).

47. The United States was required by 31 U.S.C. Section 547 (a) to invest the impounded funds. The original 1841 Act which has now been enacted as Section 547 (a) provided in full as follows:

"Statute I.
September 11, 1841.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the sixth section of an act entitled, 'An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes,' as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall approximate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.

Sec. 2. *And be it further enacted,* That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

Sec. 3. *And be it further enacted,* That the three clerks, authorized by the act of June

twenty-third, eighteen hundred and thirty-six, 'to regulate the deposits of the public money,' be, and hereby are, directed to be retained and employed in the Treasury Department, as provided in said act, until the state of the public business becomes such that their services can conveniently be dispensed with.

Approved, September 11, 1841."

48. The law requires a trustee to account to the beneficiary for his share of the profits made. In 90 C.J.S. *Trusts* §341 (a) at 599 the general rule is stated:

"A trustee who uses trust funds in violation of his duty, applied them to his own use, or appropriates trust property to himself, is liable for interest."

The text further states:

"A trustee is liable for interest if he uses trust funds in violation of his duty, *or applies trust funds to his own use or profit*, as where he makes investments and takes title to himself individually; and this is true although he received no return from his investment." (Emphasis added.)

EXCEPTION 4

Equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are appropriate to the case at bar.

49. The amount the United States saved by the use of Louisiana's money is ascertainable with reasonable certainty as the following testimony demonstrates [Tr. 306-307, 308]:

"Q. Is the amount of money saved by the Federal Government from its use of Louisiana's share of the Tidelands funds ascertainable?

"A. Yes, it is.

"Q. Have you, in fact, ascertained that amount?

"A. Yes. We have made a calculation which is based on what we believe to be reasonable assumptions as to what kind of use the funds could have been made during the whole period of the Interim Agreement.

"As I mentioned before, we believe that the investment in short-term Government securities would have been the most prudent kind of investment for a person acting in an escrow capacity to make. The reason for that being that throughout the period of the Interim Agreement, the possibility always existed that there could be a settlement on a short-term basis, therefore, short-term securities would seem to be the proper investment in order to make the fund liquid in as short a time as possible.

"But the calculation that we made was on the assumption that these investments, similar to what we show on Example 1, would have been made in 90-day Treasury bills, and that the investment would have been turned over repeatedly, including the principal and proceeds or earnings on the respective funds.

"And this calculation, over the twenty some odd year period, resulted in the total amount of funds that would have been present at June 30, 1975 to some one billion, sixteen million dollars, of which Louisiana's portion would have been approximately eighty-eight million dollars."

***

"SPECIAL MASTER: How did you determine the interest rate during that period?

"THE WITNESS: Well, we actually made the calculations by going back to the receipt of the Tidelands funds and allowing a reasonable period for the actual investment transaction to take place, I think ten days or something like that — I have forgotten specifically — but at that point in time on that specific day and at the interest rate at which those securities were being offered on that date, then that investment would have been made.

"SPECIAL MASTER: And you did the same with consequent payments into the account?

"THE WITNESS: That is correct."

50. Equitable relief may be imposed by law to prevent unjust enrichment even if there has been no breach of contract:

a. *Phillips Petroleum Company v. Adams*, 513 F. 2d 355 (5th Cir. 1975), involved money held in suspense by the pipeline company pending the determination by the Federal Power Commission of an application for an increase in the price of gas.

The practice, approved by Congress, was that when a pipeline company applied to the F.P.C. for a rate increase, it could charge its purchasers the increased price, subject to the duty to refund the increase if it was not approved within five months.

In this case, Phillips filed for a rate increase and charged its customers the higher price, subject to refund. One of the Phillips suppliers of gas (the Adams family) was another lessee in the Panhandle Field in Texas from whom Phillips purchased under a contract requiring payment on whatever Phillips received in the resale of the gas. Pending the approval of the rate increase, Phillips paid the Adams family on the basis of the old rate, or lower rate, and held "in suspense" the increase in the price it received from the consumers, pending the approval of the rate increase by the F.P.C. When the rate increase was finally approved, Phillips turned over the suspense money to the Adams family, but they claimed interest for the time the rate in-

crease was held in suspense. The circuit court held that Phillips was obligated to pay interest for its use of the suspense money. The court said:

> "The effect of this regulatory scheme is that the pipeline company collects the increased prices for years and years, using the funds thus collected as it pleases, although it will ordinarily characterize this 'suspense money' as a liability for accounting purposes."
> 513 F. 2d at 360.

The court further said:

> "Instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at seven percent interest, Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc. Such a course was certainly sound business practice, and in no way repugnant either to the federal regulatory scheme or to Phillips's contractual relations with its suppliers. But that is not to say that Phillips may enrich itself with the income from the Adams family's suspense money in the absence of any contractual sanction." 513 F.2d at 366-367.

The court concluded:

> "We also conclude that Phillips must pay interest on the principal sum of the sus-

pense money, and we accordingly reverse the judgment of district court on this point. Texas courts do not insist on statutory rigidity in the allowance of interest, for they realize that the right to interest is a marketplace concept, and that the use of money is a mercantile privilege which should not go uncompensated, absent countervailing considerations. To exonerate Phillips from its interest obligation here would be to give the pipeline company an extracontractual lagniappe, for it is incontrovertible that Phillips has derived a very considerable benefit from the unrestricted use of the Adams family's money. Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, but Phillips cannot be heard to say that it is fair and equitable that it should enjoy such financial advantage for so long, and pay not a cent for it." 513 F.2d at 370.

b. In *Buchanan v. Brentwood Federal Savings & Loan Association*, 320 A. 2d 117 (Pa. 1974), a group of mortgagors brought a class action against a number of lending institutions to require the mortgagees to account for the profits derived from their investment of the monthly tax and insurance payments that were held by the mortgagees in escrow accounts.

The contentions of the mortgagors is stated by the court as follows:

> "First, the agreement between the parties manifests a clear intent to create a trust, with the mortgage lending institutions holding appellants' monthly tax payments in trust solely for the specific purpose of paying appellants' taxes, assessments, fire and casualty insurance. The relief sought is to require the mortgage lending institutions to account to appellants for any profits derived from their investment on the monthly payments. Alternatively, a constructive trust should be imposed on the earnings produced by the use of appellants' monies." 320 A. 2d at 120.

The Pennsylvania Supreme Court held that the allegations that the monthly payments were held in escrow stated a cause of action sufficient to put at issue the creation of a trust which would require the mortgage companies, as trustee, to account for the profits derived from the use of the escrowed funds.

In discussing the elements of a trust, implied in fact, the court said:

> "It is well settled that no particular form of words or conduct is necessary to create a trust. [citations] Neither the presence nor the absence of the words 'trust,' 'trustee,' or 'beneficiary' is determinative of an intention to create a trust. [citations] The question is whether the agreements taken as a whole evidence an

> intent by appellants to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another person. [citations] To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred. [citations]
>
> "This Court in Vosburgh's Estate, 279 Pa. 329, 123 A. 813 (1924), provided specific guidance for the resolution of the question whether the parties intended to create a trust. There we held that
>
> '[a] trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefit of the other. The term "trust" is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee . . . .' " [citations] 320 A. 2d at 122-123.

An alternative argument was also advanced by the mortgagors to justify the contention that the profits earned from the tax and insurance escrow account of the lending institutions should rightfully be returned to the mortgagors. It was contended that if an express trust was not created, then the earnings should be impressed with a constructive trust. In an unanimous holding that the allegations for this alternative relief were sufficient to withstand a demurrer, the court said:

> "A constructive trust, it has often been said, is not really a trust at all but rather an equitable remedy. Like all remedies in equity, it is flexible and adaptable. Changing times and circumstances create different problems for society and present new questions to the courts. And equity has never been reluctant to right injustices or to correct societal ills." 320 A. 2d at 126.

The court then concluded:

> "The question whether a constructive trust is to be imposed on the profits earned by the investment by the mortgage lending institutions of appellants' monthly tax payments can be resolved only by answering the more fundamental question whether 'the conscience of equity' would conclude that the mortgagees would be unjustly enriched were they permitted to keep the funds." 320 A. 2d at 127.

It is significant to note that the trial court in the *Buchanan* case had sustained the demurrer on the ground that the petition failed to allege fraud. In reversing this decision, the Supreme Court of Pennsylvania (by way of footnote) said:

> "15. Although the existence of fraud may be sufficient justification for finding a constructive trust, it is by no means necessary. 5 A. Scott, Law of Trusts §§462, 465-73 (3d ed. 1967); Restatement of Restitution §§160, 163-71 (1937); *Dubin*

Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 85-88, 63 A. 2d 85, 94-95 (1949)." 320 A. 2d at 126.

51. Equitable relief to prevent unjust enrichment has been applied against the United States notwithstanding a claim of immunity from interest:

In *Henkels v. Sutherland*, 271 U.S. 298 (1926), a citizen of the United States brought suit in the Federal District Court for the Southern District of New York under the Trading with the Enemy Act to recover the proceeds of stock mistakenly seized and sold as enemy property. After the stock had been sold, the proceeds were commingled with other alien enemy funds and invested in interest-bearing securities of the United States.

The Treasurer paid the principal amount to plaintiff, which was accepted.

Subsequently, plaintiff filed an application for the appointment of a master to determine the amount of interest, which was denied on the ground that plaintiff had accepted the principal and executed a release.

On appeal, the Circuit Court held that the United States was not liable for income resulting from the investment of the funds in its own securities.

On appeal, the United States Supreme Court held that plaintiff is entitled to an accounting for the interest derived from the investment of the proceeds of the sale of plaintiff's stock, as well as the principal.

This Court said:

"The Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels's which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are held, for the account of the alien property custodian.

***

"Whether the Government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.

"The Government contends that *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 32 L. ed. 159, 8 Sup. Ct. Rep. 1156, is to the contrary, and the court below so held. In that case, the suit was for interest or income realized upon the amount of an award in favor of Angarica paid by the Spanish Government to the United States. This court, in denying the right of recovery, applied the general rule of immunity from interest, saying (pp. 259-260) that the claim 'is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the

United States would or might have received by the exercise of proper care in the investment of the money.' Without challenging the correctness of this view as applied to the precise facts of that case, *it cannot be accepted as a rule of general application.* Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and, by executive authority, after conversion into money, has been invested in government securities. *We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment.*" (Emphasis added.) 271 U. S. at 301-302.

52. While the United States was using Louisiana's money, Louisiana was performing services in connection with leases on wholly federally-owned submerged lands for which the United States received a great benefit as the testimony demonstrates [Tr. 956-958]:

"Q. By the cooperation of the Louisiana Conservation Department and by their supervision and by their encouragement they have assisted in generating an additional 350 million barrels of oil for the federal government?

"A. Approximately that amount.

"Q. Now, at the lowered price of five dollars and what, 59 cents a barrel, approximately how

many dollars would that be?

"A. That is just about $2 billion.

"Q. So the Conservation Department, then, in Louisiana made about $2 billion for the United States by this type of supervision?

"A. Well, there are $2 billion worth of oil here, yes. That is minimum, now.

"Q. And it is minimum?

"A. The reason I say that is minimum is because today's prices are, say, at $5.59.

"This oil is going to be produced as the last barrels are produced from these reservoirs because this is extra oil.

"At that point the price of oil is going to be more than it is today, we know that. So that figure will be enhanced by the difference in the price then and now.

"SPECIAL MASTER: Those figures are in barrels?

"THE WITNESS: The 343 million barrels is barrels of oil.

"SPECIAL MASTER: On which the United States and the State of Louisiana will ultimately receive royalties?

"THE WITNESS: Not Louisiana. This is totally federal.

"SPECIAL MASTER: Strictly federal?

"THE WITNESS: This is strictly federal.

"Q. (By Mr. Kellough) And the United States, then, will receive royalties based on an eighth or a sixth or whatever it may be in their lease?

"THE WITNESS: Your Honor, this is of the projects that were produced by the State of Louisiana, the Department of Conservation, which is now federally owned waters which were then disputed, between '56 and '72.

"This does not include any of what is now Louisiana production. This is totally federal.

"SPECIAL MASTER: Has the federal government paid any of the costs of that project?

"THE WITNESS: Not to my knowledge."

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,

Defendants.

REPLY BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER

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SUMMARY OF THE ARGUMENT

1. In answer to the Exceptions to the Report of the Special Master filed by the Government, the State of Louisiana contends that the Government's argument does not address the basic fact question of whether there are any revenues "from or on account of" federal area in Zone 1. All but two of the leases negotiated by Louisiana in Zone 1 contained language which limited the leases to only such area and interest within a general metes and bounds description as Louisiana might be held to own. The Government utterly failed to meet its burden of proving that the source of the claimed monies was from the lease of federal lands.

2. Louisiana also asserts that, even if the Master had found that the claimed revenues were derived from State leases of federal land, Louisiana would not be required to refund such revenues, due to paragraph 13 of the June 16, 1975 Decree, reserving Interim Agreement rights, which contract rights include the right to retain Zone 1 revenue.

3. Under the Interim Agreement, four zones were established as a working arrangement for leasing offshore, for the purpose of lifting the prior injunction on such leasing. Zones 1 (a 3 mile area shoreward of the disputed area) and 4 (on the outer continental shelf seaward of disputed areas) set up exclusive rights in the State and federal government respectively, *pendente lite*. By contrast, the arrangement for Zones 2 and 3, the intervening disputed areas, imposed joint administration on leasing and strict impoundment restraints on all disputed zone

revenues, *pendente lite*. Particular provisions of this Agreement suggest that the parties did not contemplate that boundary rulings would retroactively abrogate Zone 1 and Zone 4 contract rights.

4. Testimony of negotiation witnesses and other evidence as to the intent of the parties support both the Master's finding that Louisiana did not lease federal land in Zone 1 and that the Agreement provided only for prospective revision of contract rights on the continental shelf upon a final boundary determination.

5. In response to particular Government arguments, Louisiana has shown various reasons why the several boundary decrees and authorities governing permanent property rights which are relied upon by the United States do not sustain the Government's accounting and contract claims.

6. The June 16, 1975 Decree provisions, relied upon by the Government, not only protect Louisiana's Zone 1 contract rights, but also support Louisiana's Exception related to the financial benefits or sums derived by the Government from Louisiana's land.

7. The record, evidence and law support Louisiana's positions and provide the Court with ample bases for reaching an equitable final resolution by granting Louisiana fair recompense for federal use of Louisiana's oil lands.

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,

Defendants.

REPLY BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER

STATEMENT OF THE CASE

The United States excepted to the Special Master's finding that Louisiana has the right under the Interim Agreement of 1956[1] to retain revenues derived from sub-

[1] "Agreement between the United States of America and the State of Louisiana pursuant to Section 7 of the Outer Continental Shelf Lands Act and Act 38 of the Louisiana Legislature of 1956," executed October 12, 1956. This Interim Agreement, introduced in evidence in hearings before the Special Master as La. Exh. 1-LPI 1, formed part of a formal stipulation leading to a lifting of the Court's injunction and was lodged in the record of this case in earlier proceedings. It will hereafter be referred to without

merged lands designated as "Zone 1" in that Agreement. In the accountings related to Zone 1 stemming from the Court's Decree of June 16, 1975 (422 U.S. 13),[2] the Special Master considered contract rights reserved by that Decree under the Interim Agreement.[3] This arose because of a factually and legally erroneous claim by the Government that it is entitled to money allegedly derived from federal area in Zone 1. In truth, this money was generally derived from State areas in Zone 1, (see Figure 1), but even if it had been derived on account of federal area, it was by virtue of State contract rights granted by the United States.

Before getting into necessary masses of detail that might obscure a simple verity, let us first note the unreasonableness of the Government's posture on Zone 1 and the decrees, by quoting an important background fact: some language from paragraph 15 of the Interim Agreement, to wit:

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reference to the exhibit number it was given in the Special Master proceedings as "Interim Agreement" or simply "Agreement." The complete Interim Agreement with Amendment is set out in Appendices 2 and 3.

[2] This decree which *inter alia* set up the framework for accountings, objections, and payment by the parties, encompasses the accounting matters that were referred to the Special Master in 420 U.S. 529 (1975). Since it forms the foundation for all the exceptions and arguments now before the Court, it will usually be referred to hereinafter as the June 16, 1975 Decree, or simply the Decree, without repetitive citation.

[3] "Supplemental Report of Walter P. Armstrong, Jr., Special Master" dated August 27, 1979, hereinafter referred to as "Report," at 16-19.

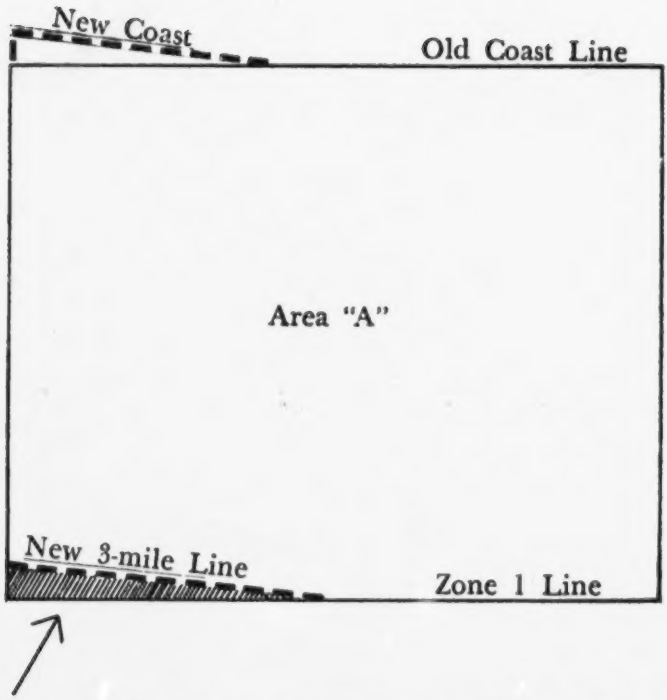

Figure 1. **Typical Zone 1 Government claim**

Due to general boundary uncertainties in eroding areas, Louisiana used technical "tract descriptions" (Areas A and B in the illustration), when leasing wetlands to outline a vicinity wherein those *parts* of the tract *owned by* Louisiana were leased. Parts *not* owned or *not* belonging to Louisiana (Area B) were not leased and not covered by the lease payments. Report pp. 18-19. The Government Zone 1 claim is that it is entitled to part of the payments made for leasing Louisiana land (Area A) merely because Government land (Area B) was in the vicinity map or vicinity description. Only two of the approximately two hundred leases did not present this situation. See Appendix 1 for details of lease descriptions.

> This stipulation and agreement shall terminate as to any area, upon the final settlement or determination of the aforesaid controversy with respect to such area; and *thereafter* the successful party shall have exclusive jurisdiction and control over the area so determined to be owned by it. . . . [Emphasis added.]

Also, in paragraph 11, Interim Agreement, it is said:

> This agreement as between the United States and the State of Louisiana shall continue in effect as to payments made. . . . (See fuller quotation and argument on paragraph 11 *infra*, under Arguments.)

This quotation's importance stems from the fact that as found by the Master, the Interim Agreement conferred *pendente lite* rights upon Louisiana with respect to Zone 1.

The Interim Agreement of 1956 employed four zones for the leasing and revenue purposes of the agreement. Zones 2 and 3 were disputed. Zones 1 and 4 were not disputed, although there was to be no prejudice as to claims not related to the purposes of the Agreement, such as permanent boundary claims, which could be prospectively asserted. However, the Agreement was unquestionably binding for its leasing and revenue collection purposes. In paragraph 6, the Agreement recognized that each government, until a final decision, was to have exclusive leasing powers over its undisputed Zone (Zone 1 for Louisiana and Zone 4 for the United States). Due to intervening changes of law and coast line erosion, the United States won minute slivers of Zone 1, involving comparatively petty (to it) sums.[4] The United States claimed

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[4] To give the Court a relative idea of the parsimoniousness of the Government in its long pursuit of its strained claims to Zone 1

money received by Louisiana from leases that had not purported to lease any federal areas, simply because state leases, in describing areas "owned by Louisiana" within larger Zone 1 sectors had merely referred to the State portion of larger tracts in which the State and federal Government had possible claims of territory. See Report pp. 18-19 and Figure 1. This money was long ago expended with the concurrence of the United States. The leases are nearly all long dead.[5] There are even contract provisions giving Louisiana a federally recognized right to collect any monies oil companies owed under the leases, after the case is over, as to rentals arising before decision of the case.[6] The State was paid only for areas it owned and only leased the areas it owned, in all but two of the hundreds of old mineral leases. The United States claims $18 million of these Zone 1 revenues merely because the vicinity maps attached to the leases, or vicinity descriptions (depicting larger areas than the area actually leased) contained fed-

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revenues, roughly $18 million of decades old, long expended funds are involved, compared to some $10 billion or more enjoyed to date by the United States from the vast areas it won outside of Zone 1.

[5] The testimony of Vernon Helms in the hearings before the Special Master summarized the information contained in La. Exh. 8 concerning more than 118 lapsed or cancelled leases in Zone 1. Tr. 749-751.

[6] This provision is set out in paragraph 11 (c) of the Interim Agreement which is applicable to any lease to which the Agreement is applicable pursuant to paragraph 11 (a). The Agreement is applicable to Zone 1 leases in that the exclusive supervision and administration of these leases is granted to Louisiana in paragraph 6 of the Agreement until the Agreement is finally terminated. *See* specific language of the relevant paragraphs in Appendix 2 *infra*.

eral area. The written descriptions of the actual granting clauses purported to lease only such portions of the vicinity areas as were owned by Louisiana. From these facts, the Government claims Louisiana derived money from Government property and should pay it the money received. The Master rejected the claims, principally on the ground Louisiana was entitled to lease Zone 1 areas prior to final decision and retain the revenues collected but, even if this were not true, the lease descriptions negated the Government claim.

As found by the Special Master (Report pp. 15-19), the Zone 1 matter presents a case of Louisiana being entitled to retain Zone 1 lease revenues generated prior to a final decree, by reason, *inter alia,* of contract rights derived from the United States. The extensive evidentiary record supports his factual findings that practice and context clearly confirmed these rights. The Master fully considered all relevant history and prior decrees in reaching his conclusion that the contract rights relied upon were reserved to Louisiana in paragraph 13 of the Decree of June 16, 1975.

The prefatory remarks of the Special Master (Report pp. 1-4) contain a succinct summary of the important recent decrees, events and issues which governed his decisions. Much of the discussion of the impact of former opinions and decrees now selectively excerpted and argued by the Government was manifestly not germane to a trier of fact familiar with the issues and the total record. Therefore, the Special Master did not clutter the Report with the out-of-context irrelevancies that are artfully woven together in the Government's arguments to form kaleidoscopes of

error. This puts Louisiana in the unfortunate position of having to burden the Court with a more fair and accurate background review to correct a mass of innuendo, charges and factual liberties.

The Zone 1 matter is one of the last of countless accounting problems, large and small, heretofore contested or not agreed to by the United States. *See* Report pp. 2-3, notes 1 and 3, itemizing the many accounting filings by both parties. Those pleadings involved the accumulation and presentation of masses of technical information and the formulation, negotiation and pleading of many legal questions.[7] The Special Master greatly aided the parties in reducing innumerable items of controversy to the simpler proportions now viewed by the Court.[8] Familiar with the

[7] There were thousands of wells, hundreds of leases, scores of pooling or unit agreements, hundreds of miles of civil engineering calculations (ascertaining the completion or draining points of countless wells in relation to the three-mile line) computer engineering studies to project and describe three-mile lines and arcs, analyses of hundreds of pipeline agreements, pipeline apportionment and escrow arrangements with scores of companies, investigation into the severance tax records of various agencies and oil companies, negotiations and controversy on dual payment problems . . . and these are but a few of the minutiae on which the Special Master led the parties into agreement—or at least non-contest—after many, many conferences.

[8] Similar successes in narrowing or eliminating the potential for technical controversy were achieved, in major part due to the Special Master's able and diligent work in narrowing coast line controversy, in the pre-1975 Decree phase of this matter. Seeing only his splendidly concise reports on the issues that survived his long and successful efforts to narrow the controversies, the Court cannot fully appreciate the injustice to Mr. Armstrong of the Government's implication that a Special Master of this Court tolerated bad faith delaying tactics. His diligence and effectiveness

whole record and the array of facts and history connected with it, he first caused the parties to amass their information and led them into ultimate agreement on innumerable matters that were either potentially contestable or formerly actively in contest. The severance tax matter is but the most recent of claims vigorously asserted or preserved by the United States initially, which were subsequently abandoned as proof became amassed against them.[9]

Much of the Government's argument touts pre-1975 decrees to challenge the Zone 1 contract rights reserved to Louisiana under the 1975 Decree's accounting provisions. It does not, however, pause to inform the Court very much about the subject matter of these decrees. If that is done, the Court may perceive the utter illogic of the Government posture. That posture is grounded in several self-contradictory premises: (1) that decrees which *did not* adjudicate Zone 1 areas and therefore made no exceptions as to Zone 1 somehow control over a decree which *did* adjudicate Zone I matters;[10] (2) that earlier decrees, in which the Court reserved the power to issue further am-

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in simplifying and resolving complex legal contentions and factual controversy prior to hearings and filings particularly deserve compliment. His Reports, of course, do not show this work by him and the parties, as they treated only the surviving controversies.

[9] *E.g.*, Claims that it should be paid the same funds by companies and Louisiana; the long failure to concur in payment to companies of pipeline escrow funds owed to companies; claiming that the Government should be paid twice for the same rights; and many other claims no longer asserted, as well as innumerable coast line contentions.

[10] The decrees and opinions relied upon by the Government all preceded the June 16, 1975 Decree.

plifying or qualifying decrees,[11] somehow control over qualifying language of later decrees; (3) that general provisions control over specific exceptions;[12] (4) that a failure to urge arguments related to the final accounting phase of the case until the final accounting phase is somehow an omission that is a proof of the invalidity of State arguments.[13] While these premises may not be explicitly stated

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[11] *See, e.g.*, paragraph 5 of the decree at 404 U.S. 388 (1971) which stated: "The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to its previous orders or decrees herein or to this decree or to effectuate the rights of the parties in the premises." A like provision was in each of the other post-Interim Agreement decrees preceding the 1975 Decree.

[12] Paragraph 1 of the June 16, 1975 accounting Decree awarding territory is of course general, whereas specific exceptions are made in paragraph 13. It is interesting also to note that the *tense* of paragraph 1 (which lies at the root of the Government's claim) is that "the United States *has* exclusive rights to explore." It did not say "has and has had." Prior Interim Agreement rights of others were reserved under paragraph 13.

[13] *See* the language of paragraph 1 of the 1972 decree, 409 U.S. 17 (1972), which passingly noted the deliberate deferral of accounting matters to a later phase, pending resolution of larger problems between the parties which would affect the accounting tasks. The only decree specifically dealing with accountings prior to the June 16, 1975 Decree was the 1965 Supplemental Decree (382 U.S. 288) which did not award any Zone 1 area to the United States and provided in paragraph 10:

> Nothing in this supplemental decree or the proceedings leading to it shall prejudice any rights, claims or defenses of the United States or of the State of Louisiana with respect to the remainder of the disputed area or past or future payments derived therefrom or attributable thereto or the operation of the Interim Agreement of October 12, 1956, as amended, with respect to such area payments.

by the Government, they are implicit in its arguments and would be the results attained if the Court accepted those arguments. A correct general review of the history of former decrees is presented below. Specific correction of Government misstatements and innuendos is presented later in the argument.

After the first state offshore oil and gas operations under state leases in the 1920's,[14] the Government took more than twenty years to bring the suit which resulted in the first Tidelands decision in 1947.[15] (Now it complains that the complex litigation took thirty years . . . during twenty-three of which it used Louisiana's revenues.) The first Louisiana Tidelands decision, on June 5, 1950,[16] was rendered prior to the Submerged Lands and Outer Continental Shelf Lands Acts of 1953.[17] Zone 1 did not exist at the time of the Court's early 1947 California and 1950 Louisiana decisions nor in 1953. It was a creature of the 1956 Interim Agreement. The first cases in 1947 and 1950 held that the United States, not the states, owned seaward of the coast line.[18] However, these cases did not actually

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[14] 1. Shalowitz, *Shore and Sea Boundaries* (1962), at 3.

[15] United States v. California, 332 U.S. 19 (1947).

[16] United States v. Louisiana, 339 U.S. 699 (1950).

[17] Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301, *et seq.* (1953), Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §1331 *et seq.* (1953), [hereinafter OCS Lands Act].

[18] The opinion in the first California case was rendered on June 23, 1947, 332 U.S. 19, and after motion for rehearing was denied, the order and decree were rendered on October 27, 1947, 332 U.S. 804. The opinion in the first Louisiana case was rendered on June 5, 1950, 339 U.S. 699, and the decree followed on December 11, 1950, 340 U.S. 899.

demark the coast line on maps, but only gave broad considerations or standards to be used in defining the coast line.[19] In 1950, Secretary of the Interior Chapman marked a line on maps representing the federal position to show the federal coast line claims.[20] On a relatively small scale

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[19] The California decree declared that the United States was "possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low water mark on the Coast of California, *and outside of inland waters*. . . ." [Emphasis added.] 332 U.S. at 805. The decree in the first Louisiana case declared that the United States was "possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the *ordinary low-water mark on the coast of Louisiana and outside of the inland waters*. . . ." [Emphasis added.] 340 U.S. 899. Of course, after the Submerged Lands Act, the exact delineation of the ordinary low-water mark on the coast and the seaward limit of inland water *was* the issue because it was from that line that the extent of state jurisdiction was to be measured.

[20] This Chapman Line was discussed in 1. Shalowitz, *Shore and Sea Boundaries* (published by the U.S. Government Printing Office for the Coast and Geodetic Survey, Department of Commerce in 1962) at 108-109: "The Chapman Line was intended to represent graphically the ordinary low-water mark and the seaward limits of inland waters along the Louisiana coast. Its description and plotting on the charts represented an effort to apply, as accurately as possible, the principles of delimitation advocated by the United States in the proceeding before the Special Master. It was not a definitive line because the charts were based for the most part on 1933 surveys. It was understood at the time that in general the line was being promulgated as the most landward line that the Government would claim for the federal-state boundary, but subject to modification, landward or seaward, in areas where the lack of up-to-date surveys prevented an accurate map delineation, and subject also to interpretive criteria to be developed in the California case." The proceedings before the Special Master referred to did not involve Louisiana but were proceedings involving matters

map, without engineering precision, this line merely grossly delimited the particular closing lines or other coast line positions of the United States to show where the United States based its position upon the ordinary low water mark and where it recognized inland water bodies, or other features constituting coast line points or segments.

When Congress adopted the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953, it also defined the coast line with the vague description of the outer limit of inland waters and ordinary low water line.[21] As in the 1947 and 1950 decisions, this vague definition did not provide precise rules for the determination of the extent of inland waters. The vast array of geographic complexities associated with islands, low water elevations, bays, sounds, harbor works, other artificial extensions, and so forth, were simply left to the Court to work out in the context of a myriad of complex factual minutiae along the Louisiana coastal area.[22]

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of controversy between the United States and California. The Government waited fourteen years to have this report approved by the Court in United States v. California, 381 U.S. 139 (1965). The three-mile quit claim of the Submerged Lands Act extended beyond the then range of offshore drilling technology of the 1950's. Not until the 1960's did technology become economic for further deeper drilling. So coast line matters were, for a time, moot.

[21] "The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 (c).

[22] The latitude left to the Court by Congress in enacting the Submerged Lands Act was discussed by the Court in the 1965 California decision, United States v. California, 381 U.S. 139. There, the Court, in discussing the legislative history of the Sub-

However, in 1953, the Congress had quitclaimed areas and rights won by Government in the 1947 and 1950 decisions. This confirmation extended not only from an uncertain base line (the coast line), but it also extended seaward to an uncertain boundary as to the Gulf Coast states. The boundary was to be either three miles or three leagues, depending upon the resolution of historic boundary factual and legal problems.[23]

The present litigation is not in fact a continuation of the suit filed by the Government that resulted in the 1950 decree.[24] Louisiana had filed a suit after the 1950 decision, and after the 1953 Submerged Lands Act, in a District Court where the trial of factual matters might have been more expeditiously attained.[25] The Government foreclosed expeditious fact adjudication by blocking that District Court action with an injunction from this Court, in proceedings filed in *United States v. Louisiana*, No. 15, Origi-

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merged Lands Act, said: "By deleting the original definition of 'inland waters' Congress made plain its intent to leave the meaning of the term to be elaborated by the courts, independently of the Submerged Lands Act." 381 U.S. at 150-151.

[23] 67 Stat. 29, 43 U.S.C. 1301 (b): "The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico . . . as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than . . . three marine leagues into the Gulf of Mexico."

[24] United States v. Louisiana, 339 U.S. 699 (1950).

[25] State of Louisiana v. Anderson Prichard Oil Corp. et al., No. 38780, 14th Judicial District Court, Parish of Calcasieu, State of Louisiana (1956).

nal.[26] The injunction by this Court had halted operations in offshore Louisiana. That injunction led to the 1956 Interim Agreement whereunder the parties agreed to a lifting of the injunction in consideration of various arrangements therein made. It was in that 1956 Interim Agreement that Zones 1 and 4 were created. Zones 1 and 4 were a part of a system of four zones employing the Chapman Line of 1950 as a base line for projecting a three-mile line. The area within three miles of the coast line then claimed by the Government was designated Zone 1 and recognized as Louisiana's to administer and lease.[27] Practice and contemporaneous construction, plus the context of the Agreement, confirmed the understanding that this included the right to receive and retain lease revenues from Zone 1.[28] Doubtlessly, it must have then been

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[26] United States v. Louisiana, 351 U.S. 978 (1956). The full text of this injunction is reprinted in the "Appendix to the Brief in Support of Exceptions of the State of Louisiana to the First Issue in the Supplemental Report of the Special Master filed August 27, 1979" which was filed on November 15, 1979 at p. 2.

[27] Paragraph 6 of the Interim Agreement provides: "Notwithstanding any adverse claims by the other party hereto, the State of Louisiana as to any area in Zone No. 1, and the United States as to any area in Zone No. 4, shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party." The "claims" referred to were boundary claims, not claims inconsistent with the leasing and lease revenue purpose of the agreement. *See* Louisiana Boundary Case 394 U.S. 11, 73, n.97 (1969), which distinguished between non-binding effects for boundary purposes compared to binding effects for lease purposes.

[28] After hearing evidence on this point, the Special Master found that this was in fact the understanding of the parties. Report at 17. *See* discussion of this point *infra* at 29-33.

anticipated that only petty future claims might be urged by the Government as to any future areas within that three-mile line forming the outer limit of Zone 1.[29] Only map accuracy or erosion problems might have been contemplated then as raising possible future claims in Zone 1, not claims inconsistent with the purpose of the agreement. *See* the testimony of negotiators of the Interim Agreement, discussed *infra* at 51-68.

Zones 2 and 3 were labeled "disputed zones," clearly implying the generally undisputed rights of each government in Zone 1 and 4.[30] Zone 4 was the more outward of the four zones treated in the Interim Agreement. In Zones 4 and 1, the Government and Louisiana were respectively recognized as having exclusive rights to lease and retain revenues. Report pp. 17-19.

Just as the Government later made claims inside of Zone 1 as its studies and investigation resulted in the development of new legal postures, Louisiana also made later claims with regard to Zone 4, *e.g.*, the dredged channel contention. However, in 1956 neither the Government's 1967 island-sound posture nor Louisiana's dredged channel posture, which respectively intruded into Zones 1 and 4, had developed.

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[29] *See, e.g.*, the discussion of lease ratification provisions, *infra* at 47 - 48, and other evidence that was considered by the Special Master.

[30] The language of paragraph 3 of the Interim Agreement, Appendix 2 *infra*, clearly implies the undisputed nature of Zone 1 and 4 rights *pendente lite* although the ultimate determination of the boundary might change the rights *prospectively* after the Interim Agreement terminated.

Not until 1958, preceded by many long years of international negotiations and conferences, did the Geneva Conference on the Law of the Sea adopt certain proposed Conventions.[31] Years of surveys of thousands of miles of Louisiana tidal shoreline preceded more years of amicable *joint* studies seeking agreement on applying the Convention. The negotiations in fact succeeded in partial amicable resolution embodied in the 1965 Louisiana decree, 382 U.S. 288. The Convention on the Territorial Sea and Contiguous Zone was approved by the Senate of the United States and ratified by the President only shortly before this Court's 1965 decision in *United States v. California*,[32] which had passed upon a *1952* Special Master's Report. Delay of that case until the Convention's approval benefited the Government. This was the lead test case on boundary rules as it was the first "tidelands" case that had already been the subject of a Special Master's Report. It offered the best hope of getting rules to use in Louisiana, but the Government sat on that Report twelve years before asking the Court to pass upon it.

In the meantime, in 1960 this Court had decided the three league problems of Gulf Coast States favorably to

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[31] Convention on the Territorial Sea and Contiguous Zone, U.N. Doc. A/Conf. 13/L. 52; Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L. 55; Convention on the High Seas, U.N. Doc. A/Conf. 13/L. 53; Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. A/Conf. 13/L. 54.

[32] 381 U.S. 139 (1965). In that case, this Court adopted the provisions of the Convention on the Territorial Sea and Contiguous Zone [1964] 15 U.S.T. (Pt. 2) 1607 T.I.A.S. No. 5639, for purposes of the Submerged Lands Act. 381 U.S. at 165.

Texas and Florida but unfavorably to Louisiana, Alabama and Mississippi.[33] As suggested by the vigorous dissents of Mr. Justice Douglas and Mr. Justice Black,[34] one could hardly malign the good faith of three defeated Gulf coast states for their contentions without maligning the good faith and rationality of preeminent dissenting members of this Court.

Similarly, when this Court decided some of the issues involving the coast line in *United States v. Louisiana*, 394 U.S. 11 (1969), the major position on the coast line then lost by Louisiana again received the endorsement of the dissenting opinions of Mr. Justice Douglas and Mr. Justice Black.[35] The points not then won by the United States nor by Louisiana were deemed by the Court to warrant the more detailed scrutiny of a Special Master and full evidentiary hearings largely because of their complex facts. Ultimately Louisiana prevailed on most of the scores of legal geographic issues the Master had to consider.

In the 1969 decision of this Court[36] as well as the coast

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[33] United States v. Louisiana, 363 U.S. 1 (1960).

[34] 363 U.S. at 101 and 85, respectively (1960).

[35] 394 U.S. 11, at 78 (1969). In writing his dissenting opinion with which Mr. Justice Douglas joined, Mr. Justice Black stated:

> . . . it is difficult to understand why the Federal Government is subjecting the State of Louisiana and this Court to a long series of technical and wasteful lawsuits. When all of them are over the United States will have little more undersea land than it already had. The only practical difference that I can see at the moment if the Federal Government wins is that it, instead of the State, will have power to lease the land to some oil company. 394 U.S. 11 at 85 n.2.

[36] United States v. Louisiana, 394 U.S. 11 (1969).

line report of the Special Master,[37] both governments lost many arguments of fact and law. No one ever cast aspersions on either party for having made a good fight on lost causes. These hotly contested issues involving potentially enormous oil and gas reserves required both State and federal counsel to put forth the utmost zeal in developing and advocating their respective governments' legal positions on vital issues. With such sums at stake, the Government tenaciously argued many points ultimately lost or abandoned,[38] just as Louisiana did. Such zeal on both sides ultimately resulted in Court recognition of many points that seemed novel or suspect when first suggested.

It was only after the 1975 decision[39] that a total accounting became appropriate. While prior piecemeal adjudications had led to partial accountings as to areas outside of Zone 1,[40] never before had there been an accounting required in connection with the adjudication of Zone 1 territory to the United States. Consider each decree. The June 5, 1950 decision[41] was prior to the Submerged Lands Act grant and prior to the Zone 1 agreement in 1956. It was even prior to the commencement of the litigation now

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[37] United States v. Louisiana, No. 9, Original, Report of the Special Master filed July 31, 1974.

[38] *E.g.*, dozens of headland, bay, water area measurement and other geographic arguments, the rejected harbor works claim denying effect to jetties, low water elevations rules, false survey positions and many other rejected positions.

[39] United States v. Louisiana, 420 U.S. 529 (1975).

[40] United States v. Louisiana, 382 U.S. 288 (1965); United States v. Louisiana, 404 U.S. 388 (1971); United States v. Louisiana, 409 U.S. 17 (1972).

[41] United States v. Louisiana, 339 U.S. 699 (1950). Of course, the decree effectuating this decision, 340 U.S. 899, was also prior to the Submerged Lands Act.

at bar. The 1960 rulings of the Supreme Court[42] dealt with the question of whether Louisiana was entitled to a three league boundary claim and explicitly reserved Interim Agreement rights. The December 13, 1965 decree[43] was to implement the Court's 1960 decree by clearing federal title to certain Zone 4 areas beyond three leagues from the State's outermost coast line claims and also for the purpose of recognizing State title to territory *outside* Zone 1 in what were originally disputed areas. Again, this was not an adjudication of any Zone 1 areas, and certainly was not an adjudication of areas involved in the coast line controversy, which were not resolved in that decree. Similarly on December 20, 1971,[44] when the United States obtained a decree implementing aspects of the 1969 decision, this too was generally as to areas at more outward locations, and was not for accounting purposes except for certain impounded funds that were released. (The Zone 1 matter does *not* relate to impounded monies.) Likewise, nothing in the 1972 decree[45] (favoring Louisiana) required an accounting. It certainly did not pertain to Zone 1 money and specially noted the deferral of accounting matters. All decrees reserved the right of the Court to order further more particular decrees.

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[42] United States v. Louisiana, et al., 363 U.S. 1 (1960), United States v. Louisiana, et al., 364 U.S. 502 (1960) providing in part:

> that as to the State of Louisiana the allocation, withdrawal and payment of any funds now impounded under the Interim Agreement between the United States and the State of Louisiana, dated October 12, 1956, shall subject to the terms hereof, be made in accordance with the appropriate provisions of said Agreement.

[43] United States v. Louisiana, 382 U.S. 288 (1965).

[44] United States v. Louisiana, 404 U.S. 388 (1971).

[45] United States v. Louisiana, 409 U.S. 17 (1972).

So it was that in the principal Decree governing the Master's report (the Decree of June 16, 1975, 422 U.S. 13), for the first time the full grant of accounting problems and the resolution of Zone 1 accounting matters arose.

In this context, the Special Master had before him a basic question: whether Louisiana was obliged to pay back or suffer offset for money the United States had contractually agreed should be paid to Louisiana, notwithstanding the outcome of the boundary controversy. Having resolved that question favorably to Louisiana, the Special Master did not have to explore the full import of his finding of fact that the bulk of the lease revenue claimed by the United States, although from Zone 1, had not been proven to be derived from or on account of areas won by the United States as required by the Decree. Report pp. 15-19. But his findings affirmed the fact that the lease bonus and rental revenue claimed by the United States related only to areas owned by Louisiana by explicit provisions of nearly all of the leases. Report pp. 18-19. Ignoring the fact that it failed to prove its claim factually, the Government, in its Statement of the Case, also glosses over the clear language of the Interim Agreement and its context which provide that revenues which were intended to be refunded were to be escrowed. This impoundment scheme for refundable revenue was in stark contrast to the clear non-impoundment contract rights related to Zone 1 revenues. That stark contrast made the meaning of the unqualified language of exclusive supervision and administration very clear. Notwithstanding the absence of explicit payment language, the exclusive rights included the right to receive and keep monies generated during the controversy.

Some clear facts emerge from this history. First, no one can justifiably be accused of engaging in or tolerating bad faith dilatory tactics in a case of this magnitude and complexity between ponderous governments. The accuser's case, not the victim's, is made generally suspect by such invective and emotional pique. Louisiana's case, by contrast, is based on evidence and law.

Secondly, the prior boundary adjudication decrees are in no way inconsistent with the later general accounting decree. The pre-1956 adjudication relied upon by the Government in fact employed the basic principle that the status quo prior to decision should be respected and no liability should be imposed for expended monies received, prior to decisions, from areas in conflict.[46] That principle supports the Louisiana position, not that of the Government. All of the post-1956 decrees reserved jurisdiction to enter additional decrees or hold further proceedings[47] and none disturbed the principle mentioned above. The 1972 decree even noted the deferral of accounting problems, stating, in treating one problem, that they had "heretofore been deferred by the parties pending resolutions of the larger disputes between them."[48]

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[46] United States v. Louisiana, 340 U.S. 899 (1950), imposing only post-June 5, 1950 decree liability.

[47] 364 U.S. 502 (1960), paragraph 8.
382 U.S. 288 (1965), paragraph 11.
404 U.S. 388 (1971), paragraph 5.
Decree of October 16, 1972, paragraph 7, granted 409 U.S. 17 (1972), paragraph 1.

[48] Paragraph 1 of the decree of October 16, 1972, granted 409 U.S. 17 (1972).

ARGUMENT

I. BASIC ARGUMENTS IN SUPPORT OF THE MASTER'S ZONE 1 RULINGS

There are two basic theses supporting the Zone 1 portion of the Report. (1) With insignificant exception, Zone 1 monies claimed by the Government were not truly derived from or on account of the parts of Zone 1 won by the Government. This alone negates the claim. *See* Report pp. 18-19. (2) Even if the funds had been so derived, still Louisiana would be entitled to keep the monies.

A. Nearly all of the lease revenue claimed by the United States was not derived from or on account of the lands or resources of the United States.

Under the Decree of June 16, 1975 paragraph 6(a), the United States must prove more than merely showing that sums were derived by leasing from Zone 1. It must also show the sums were derived "from or on account of any of the lands, minerals or resources described in paragraph 1" of the Decree; that is, it must be shown the sums were "from" in the sense of being "on account" of the federal areas.

There were many instances where it was in the interest of both governments to facilitate leasing Zone 1 where uncertainties of true boundaries existed. It is quite normal, to avoid slander of another's title while yet facilitating leasing on both sides of uncertain water boundaries,

to lease in such areas only such rights as the lessor may in fact own. See *e.g.*, testimony of Messrs. Bonnecarrere, Dupuy and Carmouche, discussed *infra,* and Report p. 18. This is done by describing a geographic area by way of engineering descriptions of metes and bounds, or by an outline of an area on a map, accompanied by language to make plain that the lease covers only lands within the area which are in fact owned by the lessor. The broader area is just to show the vicinity in which state lands are located. Bonuses and rents are in fact only for such lands as are owned within the broader area or vicinity. The uncertainty doubtlessly influences the bidding, but it at least furnishes a basis to describe an uncertain extent of land with legal certainty. Without this system, in the chaotic wetlands of rivers, lakes, bays, marshes and islands, it would be impossible to conduct mineral leasing without slandering titles en masse.

Lease revenues not physically derived from actual production in federally won areas were certainly not "from or on account" of the lands and resources ultimately decreed to be federal, in any instance where this type of lease was granted. They were "from or on account of" state lands, notwithstanding the fact that federal lands may have been within the metes and bounds areas, for those geographic areas were qualified by description language. This is unquestionably the case as the leases merely purported to lease only such lands or interest as the State owned. As we elsewhere demonstrate, all state leases are also understood in the custom of the industry as being without warranty and in the nature of quit claim leases. They do not purport to cover rights not owned. This was made explicitly clear in most of the leases. The trier of

fact heard lengthy testimony by numerous witnesses on the consistency of this understanding with custom in Louisiana mineral lease descriptions.

The Government did not present a single witness to refute that testimony, nor to refute the plain language of the leases. The detailed language of the many leases is presented in Appendix 1. See Figure 1 for graphic explanations, *supra*. It is unreasonable for the United States to claim that the bonus and rental revenues generated by those leases were from or on account of federal lands, when the very terms of the leases made plain that only lands owned by, or belonging to, Louisiana were being leased. The payments were therefore *only* for areas belonging to Louisiana. These leases were not any slander on the federal title.

Only if wells produced and revenues were paid from wells on federal land would there even be a scintilla of rationality in the federal posture, and even then, it would be incorrect, for all Zone 1 revenues *pendente lite* properly belong to Louisiana. (Incidentally, much of the money is bonus and delay rental monies, not production royalty rental.) Beyond a doubt, the evidence discussed in Appendix 1 shows that there is no basis to utterly unsupported and unsupportable federal claims that $18 million was derived from federal areas.

Thus, the United States Memorandum is remarkably devoid of any analysis of the contracts and ignores the grossly serious fact that it has not proven that the bulk of the so-called Zone 1 revenues to which it adverts are actually from or on account of the areas the United States

won. And prove this it must, for the very title of its brief before the Special Master was "On Issues with Respect to Which It Has the Affirmative Case." Only parts of two leases are "from or on account of" areas won by the United States and no other bonus or rental revenue can be so classified.

This burden extends to *time and place* problems. *See* Appendix B of the 1975 Decree, 422 U.S. 13, and consider that the Government didn't prove that the revenues were attributable to lands owned by the Government at the time the sums were derived. Proof was required. *Ipse dixit* will not suffice. The oil was in fact mostly derived from Louisiana territory, when produced.

B. If the monies were derived from or on account of federal areas, which is denied, other reasons preclude liability.

Although this argument is much greater in extent, only the revenue from two leases is solely dependent on it. *See* Report pp. 18-19, and argument *supra*.

1. *The OCS Lands Act not only authorized the Interim Agreement provisions of Zone 1, but provided that payments pursuant thereto were constructively equivalent to payment to the United States.*

Louisiana grounds its rights to retain Zone 1 revenues upon clear text, context and purpose of the Interim Agree-

ment, which formed contract rights reserved to it in the June 16, 1975 Decree, paragraph 13.[49] First, to show the true import of the Outer Continental Shelf Lands Act, we present the authority of the federal signatories. The authority to execute the Agreement also aids in construing the Agreement and its legal effect on payments made pursuant thereto.

On its first page, the Interim Agreement noted the authority of the Secretary to make agreements involving the payment of rents and royalties and the issuance of new mineral leases:

> WHEREAS, Section 7 . . . [of] . . . the Act, authorizes the Secretary . . . to negotiate and enter into agreements with the States respecting operations under existing mineral leases and *payment* and impounding of *rents, royalties and other sums payable thereunder*, and respecting the issuance or non-issuance of new mineral leases pending the settlement or adjudication of the controversy. . . . [Emphasis added.]

Section 7 (43 U.S.C. 1336) reads:

> In the event of a controversy between the United States and a State as to whether or not lands are subject to the provisions of this sub-chapter, the Secretary is authorized, nowithstanding the provisions of section 1335 (a) and (b) of this title, . . . to negoti-

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[49] ". . . Nor shall anything in this Decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this Decree, between the parties or between a party and a third party, especially, but not limited to, the Interim Agreement of October 12, 1956, as amended, which Agreement remains in effect except as explicitly modified hereby." 422 U.S. 13, par. 13.

> ate and enter into agreements with the State, its political subdivision or grantee or a lessee thereof, respecting operations under existing mineral leases and payment and impounding *of rents, royalties, and other sums* payable thereunder, or with the State, its political subdivision or grantee, respecting the issuance or nonissuance of new mineral leases pending the settlement or adjudication of the controversy. . . . *Payments made pursuant to such agreement, or pursuant to any stipulation between the United States and a State, shall be considered as compliance with section 1335 (a) (4) of this title.* [Emphasis added.]

Note that Section 1336 provides "Payments made pursuant to such agreement . . . shall be considered as compliance with section 1335 (a) (4) . . . ," which called for payments to the Secretary and deposit in the Treasury.

Thus, the OCS Lands Act not only authorized payment to Louisiana pursuant to the Interim Agreement; it also established that the effect of that payment was constructive payment to the United States. Therefore, the United States cannot claim that it has not been paid monies to which it is entitled. There is no language limiting this effect to lessees only, as claimed by the Government. Quite to the contrary, the clause in Section 1336 in fact, by *explicit* language, covers arrangements "with the State."

Thus, in addition to its other defenses, Louisiana pleads payment in defense to the United States' claim that it is entitled to Zone 1 revenues, pursuant to the OCS Lands Act rule that payment pursuant to a stipulation[50]

[50] 67 Stat. 467, 43 U.S.C. §1336.

or agreement is to be treated the same as payment into the United States Treasury.

Somehow, the Government argues that the effect of the stipulation or agreement made *with the State*, not with the oil companies, was to be understood as only for the benefit of the oil companies. It is unreasonable to impute such an intent to either the statute or the Agreement. This statutory provision governs "payment" "with the State." However, were one to agree *arguendo* with the view that the statute only constructively achieves payment by the oil companies, nonetheless, if an oil company has paid the Government constructively, the Government cannot be paid twice by also claiming actual payment from the State. The ultimate gravamen of the Government's claim must be that it had not been paid by the oil companies because they paid Louisiana. If its own law says it has been paid by the oil companies, that ends it. It has no complaint against anyone if, as the price of lifting the injunction and the total Agreement, it consented to payments to the State.

2. *The June 16, 1975 Decree reserved Interim Agreement rights to Zone 1 revenue.*

Paragraph 13 of the June 16, 1975 Decree provides, *inter alia*:

> Nor shall anything in this decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this decree, between the parties or between a party and a third party, especially, but not limited to, the Interim Agreement of October 12, 1956, as amended, which agreement remains in effect except as explicitly modified hereby.

Thus, rights under the Interim Agreement remained in effect except as explicitly modified by the Decree. Paragraph 6 (a) 's requirement to account did not explicitly modify the right to prior revenues under the Agreement, but was merely a general provision. Therefore, since the Interim Agreement and innumerable other agreements, such as unit agreements, recognized Louisiana's right to receive Zone 1 lease payments and this was confirmed by the practice of the parties, said rights are reserved by the Decree.

3. *The Interim Agreement conferred the right to exclusive leasing in Zones 1 (for Louisiana) and 4 (for the United States). This includes the right to lease revenues* pendente lite.

Paragraph 6 of the Interim Agreement states:

> Notwithstanding any adverse claims by the other party hereto, the State of Louisiana as to any area in Zone No. 1, and the United States as to any area in Zone No. 4, shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party.

Paragraph 2 provided these zones would be "binding upon the parties for the purposes hereof" although no other inference or prejudice was to be drawn from the boundary demarcations. See discussion elsewhere on the point that the Agreement was binding for Zone 1 and Zone 4 lease purposes. The Special Master found as a fact, after hearing testimony of negotiators:

> The purpose of the Interim Agreement was clearly to settle the rights of the parties to the extent that this could be done pending final determination by the Court. Report p. 19.

This Agreement was in the context of precedent following the principle that uncontested practice of receiving revenues would not result in refund liability, until the date of a decision changing the status quo.[51] The Government never challenged Louisiana's right to receive these payments *pendente lite*, even though boundary claim changes were made in 1967, and the Master so found. Report p. 17. That was indeed the unquestioned practice and construction of the Agreement by the parties, the United States receiving Zone 4 revenue *pendente lite* and Louisiana receiving Zone 1 revenue *pendente lite*. Clearly, the binding effect of the Agreement for payment purposes was confirmed by the practice. The Master tried the case, reviewed the documents, and saw and heard the witnesses on the facts of practice and contemporaneous construction. The findings, Report pp. 17-19, were not drawn from the

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[51] *See*, United States v. Louisiana, 363 U.S. 1, at 83-84 (1960). There, in note 140, the Court reviewed how the decision in 1950 was effective prospectively only. That to which the United States was entitled was an "appropriate accounting." *See* paragraph 3 of the 1960 decree 364 U.S. 502, directing the States to render to the United States an "appropriate account." This was then done in connection with the December 13, 1965 decree, 382 U.S. 288, which was "[f]or the purpose of giving effect to the conclusions of the Court" in the 1960 opinion and decree. *Only* areas outside of Zone 1 were thus adjudicated in the 1965 decree because of the unresolved coast line problems *not* treated in 1960. And of course, the whole purpose of the 1965 decree and the accounting proceedings was to determine appropriate ways in which to account.

air. We do not believe that this practice would in any way now be challenged had the factual circumstances not developed whereby the United States won all of Zone 4 while Louisiana lost part of Zone 1.

The very system of the Agreement and its content on other matters confirms the understanding that the authority to receive revenues from Zone 1 clearly included the right to retain the money. The Agreement noted the need for impoundment of revenues from the "disputed area" and the need for provision for new leasing in the "disputed area." Zone 1 was not defined as part of the "disputed area." See second "Whereas" paragraph on page 2 and numbered paragraphs 3 and 6-7 of the Interim Agreement. Note that the impoundment procedure of paragraph 7 shows that the parties manifestly contemplated the need for special refund or repayment procedures where later claim of refund or entitlement might be made. That is why the impoundment and escrow arrangements were established—to secure payment of those monies which one party might receive and be obliged to pay to the other.

Each government knew this was essential because, where one is dealing with governments, substantive liability or authority is not the only relevant legal matter. There must be special authority to pay, and that was lacking absent escrow arrangements. Thus, paragraph 7 (b) even went so far as to deal with the problem that lease revenues, once received by Louisiana into the general fund, could not even be impounded (much less paid) under Louisiana law:

> (b) The State of Louisiana, since May 22, 1953 has granted certain mineral leases which affect sub-

> merged lands located in the disputed area. The parties take cognizance that, under the laws of the State of Louisiana, the State of Louisiana cannot impound sums heretofore paid to it with respect to such leases.

Accordingly, special procedure was set up requiring lessees desiring lease ratification to pay into an impounded fund to secure such possible liability. This was only with respect to "disputed area" revenue, and was a prerequisite to ratification. No payments or liability were ever contemplated for defunct leases, or leases which were abandoned.

No impoundment procedure whatsoever was employed for Zone 1 and Zone 4 revenue, the intent being clearly to authorize new leasing and retention of prior and new revenues from those zones during the pendency of the case.

The tenor and system of the Agreement is obvious: the disputed area was the only area for which refund or payback liability might exist. That was the only area for which an impoundment or escrow arrangement was made. Yet it was known that without such an arrangement, there was no provision in the law for a pay back to be accomplished. To make the point even plainer, the parties explicitly provided that each should have exclusive leasing powers and administration over Zone 1 (Louisiana) and Zone 4 (the United States).

This, incidentally, was not a one-sided give-away. It was a reciprocal exchange of mutual rights of exclusive leasing powers. The United States received the same rights, *pendente lite*, as to Zone 4, which Louisiana received, *pendente lite*, as to Zone 1.

Those rights were only for the period until a final judgment or decree was to be rendered, without prejudice to the boundary rights and contentions that would be ironed out by a final decree. It was the latter type of non-prejudice as to the effect of the Zone 1 agreement which this Court recognized.[52]

4. *The obligations to account under paragraphs 6(a) and (b) are informational reporting obligations with liability to be determined under paragraph 6(c).*

The federal government ultimately must rely upon (a) of paragraph 6 of the Decree of June 16, 1975, to claim that sums derived from Zone 1 are payable to the United States. Such reliance does not reach the question of the limiting effect of paragraph 6 (c). Paragraph 6 (c) plainly reflects that mere obligation to account does not per se create an obligation to pay or suffer offset.

While paragraph 6 (a) [like (b)] provides that there is an obligation to render and file a "true, accurate and appropriate account," this does not mean all items includable therein create or are to reflect liabilities. Rather, (a) and (b) were merely to set the stage for the determination of liability to be made under (c). The system of subparagraph (c) shows that after the informational reporting of 6 (a), provision was made for a dispute procedure under (c) to determine which items were payable or to be taken properly into account in ascertaining net balances. Although the Decree had settled the boundary di-

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[52] United States v. Louisiana, 394 U.S. 11, at 73, n.97 (1969).

viding geographic areas, 6 (a) spoke of issues concerning the "areas still in dispute," obviously using "areas" in a subject matter sense. Other phrases, *e.g.*, "undisputed balances," "objections," and "any amount shown by such accounts to be payable," are employed which reflect that under 6 (c), liability determinations would be made. All of these phrases obviously show a system in the Decree that contemplated [1] reporting of information and positions under (a) and (b) and [2] contest and/or agreement on the liability for payment or offset as to items reflected in the accountings, to determine a net balance.

Contrasted with the federal position, this analysis of the totality of paragraph 6 provisions accords more rationally with the balance of the Decree. Paragraph 9 contemplated probable controversy about offsets. Paragraph 11 directed a further decree to treat "matters related to unresolved issues, if any, concerning accountings and payments [note—accounting was not equated with payment], offset claims [and other matters]." Paragraph 13 reserved rights under contracts, and especially under the Interim Agreement.

The federal objections do not really establish a basis for liability other than to rely on paragraph 6 (a). Merely to show removal of minerals by *third persons* is no basis of liability. This is especially true where removal was authorized by the United States in its grant of the rights to lease Zone 1, *pendente lite*. It received many benefits for that grant, including the reciprocal right to lease Zone 4 *pendente lite* and the acquisition of developed oil fields upon completion of the controversy.

5. *The non-prejudice clause of the Agreement on Zone 1 related to non-prejudice as to boundary or ownership purposes, not leasing purposes.*

The provisions of paragraph 2 of the Interim Agreement to the effect that "no inference or conclusion was to be drawn from . . . use of the so-called Chapman Line or any other boundary of said zones" were heretofore employed by the Court to support the finding that the Interim Agreement did not prejudice boundary or ownership contentions of the parties. *See* 394 U.S. 11 at 73, n. 97. Louisiana makes no claim that the Zone 1 - Zone 4 understanding modified ownership or boundaries. Thus, the quotation of this note, Government Memorandum, p. 20, in no way aids the Government. Indeed, Louisiana is not embarrassed by, but is helped by, paragraph 2 and the Court's language. We affirmatively used that language before the Master as serving the purposes of the Agreement. The Court explicitly declared that the limits of the zones "shall be binding for the purposes hereof." *The Master has found as a fact*, after evaluating a mass of evidence, that the purpose

> *was clearly to settle the rights of the parties to the extent this could be done* pending a final determination by the Court. . . . *this was recognized by both parties to include* the right to collect rents from mineral leases in that zone and to expend the funds . . . without impoundment. [Emphasis added] Report p. 19.

Louisiana is thus supported by the Supreme Court approval of the Agreement as "primarily for purposes of

reaching agreement on the leasing . . . pending a final ruling on ownership." *See* 394 U.S. 11 at 73, n. 97.

The Louisiana position is simply that, for the purposes of leasing, the Interim Agreement is like dozens of agreements such as unit agreements, which the United States regularly enters into, agreeing upon shares of oil or gas participation. Such agreements merely fix participation from areas in proximity to boundaries, during the effective period of the agreement. They do not determine ownership of land or mineral rights. They do not prejudice boundary or property claims and may be prospectively upset. However, without them, administration of leases along boundaries would require unimaginably large and numerous technical lawsuits to resolve complex participation or leasing rights. If it is held that the United States cannot so agree, or if agreements thus made are restrictively interpreted, much litigation may ensue. State *and* federal lease administration will be impaired. Some understanding of background the Special Master considered is useful to appreciate these remarks. He, of course, did not burden the Court with details of the testimony of mineral experts, *e.g.*, Messrs. Dupuy, Bonnecarrere and Carmouche. However, he certainly evaluated that background.

The non-prejudice provisions of paragraph 2 really only related to technical and boundary problems of location. Thus, the language that no inference or conclusion was to be drawn from the use of the "Chapman Line or any other boundary of said zones" to the benefit or prejudice of either party was promptly followed by other language that the specific limits of the zones were to be finally fixed by agreement or otherwise. Numerous specific agree-

ments, such as unit agreements employing specific engineering limits for Zone 1, were thereafter reached. In fact, all of the revenues which Louisiana claims to have derived from Zone 1 are in fact recognized to have been from within Zone 1's limits, as a result of agreement on specific limits of Zone 1, which resulted in no objections to the technical conclusions filed by the parties. This is part of the reason why this proceeding has been so protracted. Engineering and legal staffs met, reviewed old staff agreements, negotiated new understandings and otherwise labored at length on specific limits of Zone 1 and related revenue matters, either using agreements (such as unit agreements) confected in the past, or reaching new technical understandings of whether particular wells or unit areas were within Zone 1's specific limits. The Interim Agreement did not prejudice those negotiations as to the specific limits of Zone 1, which have all been entirely resolved. Nor did it prejudice the determination of whether particular revenues were or were not from Zone 1, or their amounts. That was a technical negotiation problem, now resolved. It should be distinguished from the controverted fact issue related to the customary import of the lease description language. This lease description issue was treated in the testimony of the lease experts and resolved, favorably to Louisiana. Report p. 18.

Specific limits of Zone 1 having been established, and facts of revenue therefrom established, the Agreement is binding for its purposes of leasing and lease revenue rights determined by those limits. Only positions on the limits or on boundary controversies were not prejudiced by the Agreement. The consequences of an area being in Zone 1

or Zone 4, once boundary matters were resolved, were of course affected in a binding way or there would have been no reason for the Agreement. The non-prejudice language simply related to precise limits of the Zones and permanent boundaries. There is no unresolved issue on these matters and thus the non-prejudice clause has as its sole surviving provision "binding for the purposes hereof."

6. *The law of executive right confirms Louisiana's right to retain revenues from exercise of leasing rights.*

In granting "exclusive supervision and administration," including the right to "issue new leases," paragraph 6 of the Interim Agreement created an executive right, defined in the general common law of mineral law as "the exclusive right to grant mineral leases of specified land or mineral rights." *See* Louisiana Revised Statutes 31:105 to 113, comprising Chapter 6 of the Louisiana Mineral Code.

These provisions of the 1974 Louisiana Mineral Code are not per se[53] dispositive of the issue, but they are reflective of the general common law federal courts would follow. See 2 Williams and Meyers, *Oil and Gas Law*, Secs. 338 and 339, for the general common law which served as a model for Louisiana law.

As earlier noted, Louisiana maintains that the Outer Continental Shelf Lands Act itself and the Interim Agreement both support Louisiana's position. These authorities

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[53] However, 1975 amendments to the Outer Continental Shelf Lands Act do adopt the law of adjacent states in 1975 as federal law—*see* 43 U.S.C. §1333 (2).

would of course control over general common law, and they support Louisiana.

However, to the extent the general common law of mineral transactions would aid in interpreting the Agreement, given the oil and gas legal expertise of the principal negotiators, general common law as federal common law might be useful in gauging the intent of the parties' oil and gas experts. That general common law, codified in the Louisiana Mineral Code, and adopted as surrogate federal law, would recognize the freedom of parties to create independent executive rights which entitle the holder to all lease revenue. *See* La. R.S. 31:106, and the Comment thereto that the rules did not prevent "other forms of contract."

As analyzed earlier, the form, context and practice of the parties under the Interim Agreement *all* show that Louisiana had the right to receive all forms of lease revenue derived from its exercise of its executive right, until a final judgment might prospectively provide otherwise. This would include royalty revenue. However, if this intent and practice were not present, at the very least, the general law of executive right would afford the right to retain bonus and delay rental revenue. Thus, Article 105 of the Louisiana Mineral Code, in codifying the general national common law rule recognized in the *Williams and Meyers* treatise, states "unless restricted by contract it [the executive right] includes the right to retain bonuses and rentals."

Therefore, as a very minimum, even if Louisiana's overall Zone 1 defense were rejected, Louisiana would be

entitled to retain bonuses and rentals from Zone 1, by reason of paragraph 13 of the Decree confirming rights under the Interim Agreement.

7. *Royalty revenue derived from unit agreements should not be refunded to the United States or used to strike the balance under paragraph 6(c), due to the exemption and protection of contract rights under paragraph 13.*

The small extent of royalty revenue is,[54] in major part, from pooled or unitized production under agreements that fix the participation. Again, paragraph 13 of the Decree reserved rights under existing contracts. While prospective revisions of unit participations may be in order, the participation fixed by unit agreements is retroactively protected under paragraph 13 of the Decree, which says

> Nor shall anything in this decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this decree, between the parties or between a party and a third party, especially, *but not limited to*, the Interim Agreement. . . . [Emphasis added.]

Unit agreements offshore are often complex agreements where participation is not determined on a mere pro rata acreage basis. Often, participation is negotiated taking into account a complexity of technical facts which determine the equities of participation where a boundary

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[54] Some $11,921,654.65 of royalty revenue is included in the Government's Zone 1 claim. This is a miniscule amount compared to the countless billions of dollars the United States has enjoyed from areas it won offshore Louisiana.

crosses a reservoir. For example, if parcel A belonging to owner A has 50% of the reservoir underlying it, this may be only one factor used in negotiating an agreement. Owner B of parcel B, which may have only 30% of the reservoir acreage, may have his acreage situated high on the structure, and the reservoir may be far thicker under B, containing more hydrocarbons, thus entitling him to perhaps 60% participation. Owner A, on the other hand, possessed of far more acreage in the reservoir, may have a thinner portion of the productive sandstone underlying his land, be low on structure adjacent to water (which means oil wells on his land would quickly dry up or produce excessive waste water), and have less oil content under his larger productive acreage. A and B, together with other owners with lands overlying the reservoir, may have negotiated what to their experts is an equitable participation in the reservoir. The location of the boundaries of the lands overlying the reservoir are thus but one of many very technically complex facts determining participation in such negotiated unit agreements. In the course of negotiation, give or take may occur on one factor as a *quid pro quo* for agreement on another factor. Therefore, if a new boundary adjudication occurs, there should, equitably speaking, be no automatic redetermination on a pro rata acreage basis. There should be a renegotiation. *A fortiori*, there should not be a retroactive upsetting of prior revenue.

These are the reasons why protections against retroactive upsetting of unit agreements were provided in paragraph 13. Expert evidence and argument was presented to the Master on these policy reasons underlying oil and gas contracts. These reasons are perfectly consistent with paragraph 6. They would honor the boundaries called for by

the Decree, and merely refrain from upsetting agreements retroactively. This principle is acutely important where the boundary location was but a single, perhaps small, factor in a negotiated participation formula under an oil and gas contract.

The merits of the arguments in this sub-part are confirmed by the practice of the parties and subsequent modification of the Interim Agreement itself, an amendment not presented to the Court in the copy of the Interim Agreement in the Government Memorandum. That copy adroitly implied that paragraph 10 had not been amended although the fact of the amendment is truly uncontraverted and its effect was previously argued.

Originally, the Interim Agreement provided that allocations of royalty under the Interim Agreement in connection with unit production was to be allocated on a pro rata acreage basis. On December 11, 1964, a formal modification of that Agreement was made and reads as follows:

> AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF LOUISIANA AMENDING ARTICLE 10 OF THEIR AGREEMENT OF OCTOBER 12, 1956, PURSUANT TO SECTION 7 OF THE OUTER CONTINENTAL SHELF LANDS ACT AND ACT 311 OF THE LOUISIANA LEGISLATURE OF 1964
>
> WHEREAS, on October 12, 1956, the United States of America and the State of Louisiana entered into an agreement regarding the operation and management of submerged lands off the coast of Louisiana

pending determination of the ownership of such submerged lands; and

WHEREAS, the second sentence of Article 10 of that agreement provides:

> If, however, in connection with royalty payments, any well or wells are bottomed under a unit theretofore validly established which includes submerged lands lying within the area of dispute, the royalty from such well or wells shall be allocated to each lease or portion thereof lying within the area of dispute, in the proportion that the number of acres covered by such leases and participating in the production from any such well or wells, in accordance with the terms of the unit agreement, bears to the total number of acres so participating in such production.

and

WHEREAS, experience has shown that in some circumstances it is preferable to allocate unit royalties on some basis other than that of acreage as required by the foregoing provision,

NOW, THEREFORE, the United States of America, acting by and through the Secretary of the Interior with the concurrence of the Attorney General, pursuant to Section 7 of the Outer Continental Shelf Lands Act, and the State of Louisiana, acting by and through the State Mineral Board with the concurrence and approval of the Attorney General pursuant to Act 311 of the Louisiana Legislature of 1964, agree that the second sentence of Article 10 of the Agreement of October 12, 1956, is hereby amended to read as follows:

If, however, in connection with royalty payments,

> any well or wells are bottomed within a unit validly established which includes submerged lands lying within the area of dispute, the royalty for minerals produced from such well or wells after establishment of the unit shall be allocated to each lease or portion thereof lying within the area of dispute in such proportion and in such manner as may be agreed to by the State Mineral Board and the Secretary of the Interior, or his delegate.
>
> THUS MADE AND EXECUTED effective this 11 day of Dec., 1964. [There followed the signatures of the Secretary of the Interior and other federal and state officials.]

This amendment which related to the proportions to be credited to Zone 1 or 4 to be paid to Louisiana or the United States, as the case may be, or to be credited to Zone 2 and 3 impounded revenues, confirms the basic factual point made in this subpart, that the oil and gas experience of the parties has shown that the determination *or redetermination* of unit equities can only be made by agreement of the parties. The Decree, in paragraph 12, protects these rights under the 1964 amendment. Therefore, the Master could not disturb them, not even prospectively, and certainly not retroactively, without new agreements being confected, due to the fact that mere boundary placement is too inextricably involved in a host of other technical factors that determine whether production is "from or on account of" which party's resources.

Apart from the particular need to not disturb unit participations retroactively, this discussion of unit equities illustrates a principle that was in the spirit of the Interim

Agreement. Oil and gas contracts involving rights to lease or participation, made among a great complexity of factors, should not be disturbed retroactively by ultimate determinations that one of those factors, a boundary, is different than as agreed for the limited purposes of leasing and interim payments until decision. That is why paragraph 13 of the Decree makes good sense.

8. *Interim Agreement rights, protected by paragraph 13 of the Decree, show that it was intended that any determination of the controversy would have prospective application only.*

Paragraph 15 of the Interim Agreement, states *inter alia*:

> This stipulation and agreement shall terminate as to any area, upon the final settlement or determination of the aforesaid controversy with respect to such area; and *thereafter* the successful party shall have exclusive jurisdiction and control over the area so determined to be owned by it to the extent fixed by the decision in the final adjudication. . . .
>
> Upon final settlement or adjudication of the controversy as to all of the submerged lands within the disputed area, this stipulation shall finally terminate, subject only to the release of payments and the validation and ratification requirements hereof.

Thus, it was agreed an adjudication was to have prospective application only.

The only provision in the Agreement for the release of payments upon final settlement or adjudication related to impounded revenue and payments by lessees to obtain

lease validations. *See* discussion of third party agreements, *infra*.

The Government would have the Court believe that a pre-1953, pre-1956 decision *not* deciding coast line or 3-mile projection matters controls over this clear, specific language, preserved by paragraph 13 of the 1975 Decree. General language of the post-1956 decrees does not irrationally wash out this sensible prospective provision preserved in the 1965 decree implementing the 1960 decree, and also preserved in 1972 and 1975. *See* discussion of decrees, *infra*.

9. *Payments called for by the Interim Agreement are exempt from the offset procedure of paragraph 6(c) of the Decree.*

Paragraph 14 of the Interim Agreement provides:

> Any sums required to be impounded by either party hereto, or to be paid over or released to the other party by any party hereto, shall be impounded, paid or released without reference to, limitation by or offset against any claim against or liability or obligation of the other party. . . .

This provision plainly contemplates that sums to be paid under the Agreement are not to be figured in any offset claim or system. The United States' claim is prosecuted under paragraph 6 (a) of the Decree and ultimately paragraph 6 (c), pursuant to offset procedure in the Decree. Paragraph 13 of the Decree, though, explicitly protects rights under this Agreement. It is therefore submitted that payments made pursuant to Zone 1 or Zone 4 rights are not subject to offset under paragraph 6 (c).

That is not to say, however, that impounded funds are not available to pay liabilities the Agreement establishes should be paid out of those funds, *e.g.*, sums derived from federal use or unjust enrichment on account of State lands or resources.

10. *The form of third party agreements attached to the Interim Agreement shows that it was explicitly contemplated that the United States would look to mineral lessees instead of to the State with respect to unimpounded lease payments.*

Among the documents appended to the Interim Agreement was Exhibit B, "The Lessee's Consent and Waiver Form." In the discussion *infra* of the language of various leases (See Appendix 1 also) affecting Zone 1 areas won by the United States, it is shown that there are only two leases which do not contain quitclaim-type granting clauses. All other leases, in their descriptions, mooted the Government claim. Those leases were granted prior to the 1956 Interim Agreement, in 1954. As a condition of the lessees' obtaining federal ratification of such leases, the lessees' consent and waiver form provided:

> Also, as to any of the listed leases granted by the State of Louisiana since May 22, 1953, if any, which are referred to in Paragraph 7 (b) of the foregoing agreement, the undersigned further agrees to pay to the United States, if it is the successful[55] party in the litigation, such bonus, rental, royalty or other payment due with respect to such area or portion thereof which

[55] Of course, it has to be first determined the United States has a right to Zone 1 money. Among other reasons, it is not so entitled, due to paragraph 6 of the Agreement, as discussed *supra*.

> has not been impounded under the provisions of said Paragraph 7 (b), such payment to be made within ninety (90) days following the final adjudication or determination of the controversy.

Thus, the modest solace with respect to those two leases is not that the Government is to be paid by Louisiana, but *by the lessees*, and then *only* if they seek ratification.[56]

At this point, it becomes apparent why the Interim Agreement in other provisions argued below (paragraph 11, Interim Agreement), contemplated no liability for lapsed or terminated leases but continued the right to recover payments received thereunder. Only if the United States was to be called upon to grant new leasehold rights by ratification could it expect recompense, and then only from the lessee.

11. *Under Paragraph 11 rights of the Interim Agreement, there is no refund or offset liability for terminated leases.*

Louisiana put into the record substantial information pertaining to the failure of various lessees to maintain leases in effect in Zone 1.[57] This discussion shall demonstrate that as to leases which have been cancelled or abandoned by reason of non-production, there is no liability

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[56] The lessees might then have a claim back against Louisiana, if these leases were with warranty. *See* La.R.S. 31:120. Thus, to impose direct liability on Louisiana vis-a-vis the United States might cause double payment and collection.

[57] *See* testimony of Vernon Helms, Acting Director of the Mineral Income Division, Louisiana State Mineral Board, Tr. 744-751.

with respect to the revenue therefrom. Subparagraph (c) of paragraph 11 of the Interim Agreement of 1956 provides:

> Any lessee shall have the right to elect not to maintain in force and effect any lease brought under the terms hereof, but any such election or any failure of a lessee to maintain a lease in effect shall not relieve that lessee of the obligation to pay to the State of Louisiana[58] or to the United States, with respect to such lease, all bonuses, rentals, royalties and other considerations (and with respect to the State of Louisiana all licenses, taxes and fees) which have become due prior to the termination of forfeiture of said lease. Also, this agreement as between the United States and the State of Louisiana, shall continue in effect as to the payments made with respect to such lease.

This subparagraph (c) is a part of paragraph 11 which made plain that it was not merely applicable to the disputed area zones, but applied to *any* area affected by a lease or portion thereof to which the Agreement was applicable. Thus, paragraph 11 opened with the phrase:

> Upon the final settlement or adjudication of the aforesaid controversy, as to *any* area affected by a lease or portion thereof to which this agreement is applicable. . . . [Emphasis added.]

These validation procedures treated in the various parts of this paragraph only required receipt of impounded funds as a prerequisite to validation. This suggests no

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[58] This also shows paragraph 6 of the Interim Agreement contemplated payment rights in its exclusive administration, jurisdiction and right to lease provisions.

claim would exist as to unimpounded revenue. It was in this context that subparagraph (c) spoke of liability to *either* the State of Louisiana (only by Zone 1 provisions was liability to Louisiana contemplated) or the United States, by lessees, with respect to payments due prior to termination or forfeiture of the lease.[59] Then, in the last sentence of the paragraph it was said, "This agreement *as between the United States and the State of Louisiana shall continue in effect as to payments made with respect to such lease.*" Recall that paragraph 11 opened by dealing with the consequences to flow "upon the final settlement or adjudication." Thus it is clear that as to any terminated or forfeited lease the Interim Agreement continues in effect with respect to past payments made to Louisiana or the United States. Since both parties had the right to receive payment for issuing new leases as part of their rights of exclusive administration and supervision in Zone 1 (Louisiana) and in Zone 4 (federal), that right to receive and retain past revenues has continued in effect and is not terminated by the Decree.[60] If (as it is indeed provided in subparagraph (c) of paragraph (11), Louisiana has a post-adjudication right to collect any unpaid monies that should have been paid to it prior to final adjudication, *a fortiori*, it may retain sums in fact paid to it under authority of paragraph 6.

This argument interlocks with the argument made elsewhere that the Government only contemplated payment

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[59] *See* paragraph 11 (c) of the Interim Agreement quoted *supra*.

[60] The Decree continued the Interim Agreement in force except as explicitly modified by the terms of the Decree. 422 U.S. 13, 18, paragraph 13.

to it for unimpounded lease revenues if a lessee sought ratification of a lease, and then such payment was to be made by the lessee, for the rights to be gained by the lessee.

C. Testimony supports the conclusions of the trier of fact as to the intent of the Interim Agreement with respect to the right to receive and retain Zone 1 revenues

1. *The Master's Zone 1 findings included fact findings based upon an appraisal of testimony*

Previous discussion has primarily treated documentary evidence. However, the trier of fact considered much more than the documents. In his Report, he did not have to discuss the detail of the testimony he had evaluated because there was clear documentary evidence and because there was no serious contrary evidence. However, that is no reason for the Government to imply that the Zone 1 issues before the Court are purely or substantially legal in character, nor to imply that the results were compelled by legal interpretations alone[61] or only involve construction of documents.[62]

These postures of the Government contrast sharply with the reality that although the Government lacked evidence to support its denials, the Special Master made important fact findings from testimony which, although often uncontradicted by evidence, had not been admitted by the

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[61] Government Memorandum, p. 5.

[62] Government Memorandum, p. 7.

Government. For example, the finding was made that in practice both parties did not question the other's right to receive *and retain* revenues from Zones 1 (State) and 4 (federal). Report p. 17. The Government continues to deny this right to retain the money while simultaneously contending there was no testimonial or evidentiary evaluation on any important disputed factual matter. This simply does not accord with the Report. Thus, quoting paragraph 6's grant of "exclusive supervision and administration" from the Interim Agreement, the Special Master found:

> Pursuant to this provision, the State of Louisiana did in fact collect *and retain* rentals on mineral leases on areas lying within Zone 1 and the United States did so on those areas lying within Zone 4. Neither party questioned the other's right to do so, and so it is apparent *that both considered* that the right to "exclusive supervision and administration" included the right to collect *and retain* those rentals. . . . Report p. 17. [Emphasis added.]

He made yet another important finding of fact which further contradicts the view that his findings did not purport to resolve any factual matter.[63] Thus, he found that

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[63] True, some of the evidence was so clear it was undisputed; but it would be most sophistical to say that the findings of a trier of fact, grounded in uncontradicted testimony, are thereby legal in character and the uncontradicted nature of the testimony is somehow reason to reverse findings based on that testimony. He heard the several witnesses and gave weight to the importance of what they said in part because of their impressive sincerity in expressing their understanding of the 1956 Agreement and also because there was no *contradictory sworn* testimony, although in pleadings and accountings, the Government denied what it would not—could not—contradict with sworn testimony.

Louisiana had usually incorporated provisions in its Zone 1 leases which showed that the leases covered and the revenues were from *only* those lands that were Louisiana's in Zone 1. This, the Special Master concluded, negated the federal claim to those revenues.[64] Thus, the Report, pp. 18-19, found:

> Louisiana apparently anticipated the possibility that some portions of the areas in Zone 1 upon which it granted leases (as it was specifically authorized to do under the Interim Agreement) might ultimately be adjudged to belong to the United States, as it inserted in all of those leases except two a provision that it was leasing the right to extract minerals *only* from those parts of the described areas "belonging to the State of Louisiana" or such as were "owned by the State of Louisiana." Whether this language gives rise to a claim by the United States against the lessees is not now before the Special Master for consideration, but it does tend to negative any claim by the United States against the State of Louisiana. [Emphasis added.]

Another fact finding buttressing his conclusion on the Zone 1 issue related to the purpose of the Interim Agreement:

> The purpose of the Interim Agreement was clearly to settle the rights of the parties to the extent that this could be done pending final determination by the Court. Under it, Louisiana was given "exclusive su-

[64] This is because the lease revenues were not derived from or on account of the federal areas. This was required by the Decree's language to give rise to a liability to account for unimpounded revenue.

> pervision and administration" over all areas lying within Zone 1, and this was recognized by both parties to include the right to collect rents from mineral leases in that zone and to expend the funds so collected without impoundment. This agreement remained in full force and effect until the entry of the decree of June 16, 1975, under which its terms were validated except as therein explicitly modified, therefore the State is entitled to keep all rentals derived prior to the entry of that decree from mineral leases upon areas lying within that zone, and the United States has no right to recover them.

These conclusions were not grounded upon capricious speculation or mere document examination. They were based upon a record of testimony. Most of that extensive testimony was assiduously avoided in the Government Memorandum excepting to the Special Master's concise and well-reasoned fact findings as to federal recognition of the purpose and right to *retain* Zone 1 revenues. The only testimony quoted by the Government in its Memorandum was that of a career attorney, who admitted he knew nothing about oil and gas contracts, while nonetheless opining about oil and gas contracts. However, even that testimony tended to aid rather than harm Louisiana's position.[65] One brief remark was attempted as to the testimony of one Louisiana witness,[66] and that was a statement taken out of context.[67]

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[65] *See* testimony of Mr. Swarth on the intent of letting Louisiana receive Zone 1 revenue, discussed United States Memorandum, p. 23, and further analyzed hereafter.

[66] Government Memorandum, p. 21.

[67] The Government said in its Memorandum, p. 21, that Mr. Dupuy had said that "no complete waiver—as opposed to a postponement—of accounting claims in respect of Zone 1 was in-

The pretense that this was not an evidentiary matter and the accompanying failure to treat the evidence seriously in the Government Memorandum are quite understandable. An examination of that evidence shatters the pretense that facts are not involved and supports the fact findings of the Special Master.

2. *General comparisons of the credibility of federal and State testimony on Zone 1 matters present a Contrast in expertise and full disclosure.*

The United States Memorandum, p. 21, obscures a major void in federal evidence. It speaks of "*The* federal negotiator whose deposition was introduced in evidence. . . ." [Emphasis added.] This does not mean, as it implies, that there was only one federal negotiator, nor does it mean that any other federal negotiator gave in-court testimony. The Government merely used the testimony of only one of many federal negotiators, by deposition; and, at that, a person who knew nothing of oil and gas con-

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tended." Indeed, Louisiana *had not waived* its accounting claims *against the United States* for monies wrongfully taken by the United States from areas *inside* of Zone 1 owned by Louisiana. Louisiana didn't waive that claim to some $5 million or so of funds about which Mr. Petty, a federal Treasury official, testified. Tr. 584. That in no way helps the Government. Moreover, Mr. Dupuy's testimony at Tr. 646 was in the context of claims which were generally *not* Zone 1 accounting claims. Claims such as Zone 1 boundary claims certainly were deferred and protected by the Interim Agreement. Elsewhere, Mr. Dupuy made quite plain that it was intended Louisiana would permanently retain Zone 1 revenue. *See* direct quotations in text.

tracts.[68] There was no explanation of why the others, including oil and gas contract experts, were not called.

By way of contrast, several of the leading members of the Louisiana negotiating team were called to testify and subjected to in-court examination by the Special Master and in-court cross-examination. Death or severe illness explained the absence of others.[69] All of Louisiana's negotiation witnesses were quite experienced in oil and gas law or contract problems, in sharp contrast to the Government boundary advocate.[70]

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[68] The Interim Agreement involved Interior Department and Treasury Department responsibilities of lease and revenue administration. It also involved the maritime boundary litigation contentions for which the Department of Justice and the Solicitor's office had responsibility. Therefore, the federal negotiating team included a maritime boundary litigation expert. This boundary expert testified he knew nothing of the oil and gas contract aspects. (Dep. Tr. 71-72) Yet he alone was chosen to give an out-of-court deposition, about the accounting, financial, and oil and gas lease rights under this oil and gas lease administration agreement. The principal federal negotiators were not called by the Government. There were technical experts on the federal negotiating team who knew about the oil and gas contract aspects of the Interim Agreement. None were called, and no explanations were offered, nor are any now offered, for their absence.

[69] *E.g.* Mr. Austin Lewis and Mr. John Madden are deceased; Mr. William Helis, the then-Chairman of the Mineral Board and principal negotiator, has disabling health problems, and other negotiators were also, due to health, unable to testify. *See* Tr. 30-31.

[70] Contrast, for example, the understanding by Mr. Dupuy and Mr. Swarth on the nature and import of "executive rights" in mineral law. At Tr. 626-627, Mr. Dupuy showed he was quite aware of the general background law that to confer a right to lease land for mineral rights creates an "executive right," which carries with it the right to rentals. See discussion of executive right law in the text *supra*. When asked about the law of executive right, Mr.

An evaluation of the reasoning of the State and federal witnesses must have influenced the Special Master in his findings. Louisiana's witnesses testified to correct and credible background reasons and facts supporting their understanding of the import of clauses of the Interim Agreement now in controversy. While not attributed to the testimony, these reasons were, in essence, adopted by the Special Master. Report pp. 18-19. They also testified to the fact that the opposing experts on the federal team had similar background understandings, especially regarding right to retain revenues. By contrast, the sole federal witness presented admittedly erroneous legal reasons and documents antedating the Interim Agreement as purported bases for interpretations of the import of the Interim Agreement clauses in controversy.

3. *The testimony of the State negotiators amply supports the Special Master's findings of fact on Louisiana's entitlement to retain Zone 1 revenue and on related matters*

The Testimony of Mr. Dupuy

Mr. Dupuy had an unusual combination of expertise and experience that made his testimony valuable in regard to the Zone 1 matters. A consulting geologist and oil man,

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Swarth testified, Swarth Deposition, pp. 81-82:

Q. Have you ever heard of the legal term used in oil and gas property law, executive right?

A. I don't recall it.

Q. Were there people in on negotiations for the United States who were more experienced and expert on oil and gas matters per se than you were?

A. Oh indeed, yes, the people from Interior were.

Mr. Dupuy also had considerable experience as an oil and gas lawyer, both as an assistant to the Attorney General of Louisiana during the period that the Interim Agreement was written, and thereafter in private oil and gas practice.

As one of the State attorneys involved in the negotiation of the Interim Agreement, Mr. Dupuy was familiar with the system of zones in that Agreement. He was asked:

> Q. Did Louisiana feel like it had to refund money from Zone 1 after you all had negotiated that Interim Agreement of 1956?
>
> A. No, definitely not.
>
> The Zones I and IV were considered alike. Neither was considered to be disputed for the purposes of the agreement. Tr. 611.

This testimony was elicited in connection with the testimony of a federal witness that the Government had not, with regard to Zone 4 payments to it, set up contingency liability accounts.[71] This had shown beyond doubt, that *even the Government* never construed the undisputed zone revenues as being subject to possible refund or offset liability. Mr. Dupuy was testifying, in effect, that this was consistent also with Louisiana's understanding and handling of Zone 1 revenue. *See also* testimony at Tr. 612 about the fact that both parties understood there was to be exclusive Louisiana jurisdiction in Zone 1 and exclusive federal jurisdiction in Zone 4. This exclusive jurisdiction was understood in light of the knowledge that it would result in payments of money to Louisiana for Zone 1 being spent, if not impounded under the Interim Agreement,

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[71] *See* testimony of Mr. Arnold Petty, Tr. 596.

and for which no refund mechanism would exist in the law. Tr. 612-613. Important federal officials such as Herbert Brownell were involved in the negotiation and had fine staff support. These officials realized full well that refund of money to be received and not impounded would have had to depend solely upon the grace of the Louisiana legislature in passing new legislation. Therefore, if receipts were to be refundable, they would have been impounded given the atmosphere of the time.[72]

Q. Did the United States realize at that time that the problem to which one of the defendant witnesses testified about having to get acts for an appropriation also would have existed with respect to Louisiana as to any unimpounded funds and liabilities? Did they realize this?

A. Well, I am certain it was made very clear that we had no authority to impound or we had no money, as a matter of fact, that had already been spent.

It would have taken an act of the legislature. It had already been spent and it would have taken an act of the legislature to so put up the money again and to impound it.

For that reason the Interim Agreement recognized that fact and the Document Five Agreements of Lease that were granted by the State after 1953 and between the 1956 agreement provides that. Tr. 614.

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[72] In the political atmosphere of the mid-1950's, no responsible federal official would have made a federal fiscal benefit related to the then bitter Tidelands controversy solely dependent upon the grace of the Louisiana Legislature.

At Tr. 617-624, Mr. Dupuy explained the customary system of leasing State wetlands in Louisiana. A typical inland[73] wetlands lease was discussed with its language indicating that the lease covered lands owned by the State within the broader tract description. This was a customary type of State wetlands lease description, as the public has been advised repeatedly, and *does not purport to cover more than the lands owned by the State within the tract. It is not a claim to the whole tract.* Tr. 621. The system is essential and customary to the leasing of State lands in the confusing title and boundary problem areas of Louisiana wetlands. *See* Tr. 622-624.

Mr. Dupuy also testified that the customary understanding in Louisiana is that the holder of an executive right[74] who grants a mineral lease is entitled to the bonus and rentals. Tr. 626-627.

Very little of significance was brought out on the cross-examination of Mr. Dupuy, except the suggestion by counsel, that the non-prejudice language of paragraph 6 of the Interim Agreement may have related to inaccuracies

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[73] Use of an *inland* wetlands lease was employed to show that nothing special nor extraordinary was being done with Zone 1 leases. Exactly the same type of descriptions are used all over the State in leasing wetlands, to avoid accidental title slanders and claims that the State is deriving revenue from or on account of the lands of others.

[74] Louisiana maintains that as a very minimum, if it did not do more, paragraph 6 of the Interim Agreement conferred the executive right of mineral law upon Louisiana (as to Zone 1) and the United States (as to Zone 4). The executive right is the power to grant leases, which includes the right to the leasing proceeds known as bonuses and rentals. *See, supra,* at 38-40.

in the Chapman Line. Tr. 640. As earlier discussed, Louisiana recognized that there were technical problems in delimiting the Chapman Line and the 3-mile projection, but these were all worked out, so there is no substance to the suggestion of counsel. The examination did clarify the witness's understanding that Zone 1 and Zone 4 rights were to continue until an adjudication. The witness very correctly distinguished, in response to a question by the Master, between matters of conveyance of title (which the Interim Agreement did not do) and the matters of the handling of money and the right to money (which the Interim Agreement did affect). Tr. 641.

Very interestingly, the witness noted that while language of relinquishment of claims as to Zone 1 and Zone 4 had been dropped, Zone 1 provisions were for the purpose of showing the grant of the Submerged Lands Act and that Act indeed referred to relinquishment of the federal claims. Tr. 645. *See* 43 U.S.C. 1311 (b) (1): "The United States releases and relinquishes unto said states. . . ." The obvious purpose of the Zone 1 boundary was to show the area relinquished by Congress. Although the Government might still make claims thereto, or refine its boundary position in the litigation, the witness made plain that it was the negotiators' understanding that the Zone 1 - Zone 4 rights would be effective for the purposes of the Agreement *until changed*. *See* Tr. 646-647. Again, the witness made plain that while rights and claims were reserved, they were not to retroactively affect the Agreement:

> Perhaps there was a mutual recognition of the possibility of potential claims, but for the purposes of

> our agreement, nothing retroactive was going to have to be returned. Tr. 648.

He also explained, in redirect, that it is customary for oil and gas agreements to have an interim revenue effect, conveying rights to distribution or lease revenues until an adjudication might prospectively provide to the contrary. Tr. 669-670. Of course, that is what the Interim Agreement did as to Zone 1.[75]

To avoid this powerful testimony, the Government in its Memorandum, p. 21, incorrectly represented the significance of this testimony as conceding that no complete waiver of accounting claims was intended. Actually, even the isolated passage cited by the Government says *nothing* about *accounting* claims. The cross examination cited included reference to claims generally. Of course, Louisiana's rights to Zone 1 money wrongfully received by the United States prior to the 1956 Agreement were reserved to a later proceeding and not resolved by the 1956 Agreement. Of course, boundary claims were reserved until later. Louisiana has never maintained that Zone 1 accountings were not to be deferred until after the final boundary determination. The Government owed and still owes Louisiana for Zone 1 money which it wrongfully procured in Zone 1 areas *won* by Louisiana. That was the *only* later accounting liability. But none of this defeats Mr. Dupuy's

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[75] Government argument (that even an incorrect perception by a negotiator is probative) returns to it with the *a fortiori* force of correct and uncontroverted understandings of the negotiators, as to the meaning custom would give their words. *See* Government Memorandum, p. 18, n.7.

testimony, that the import of the Agreement was that "nothing retroactive was to be returned" with respect to payments covered by the Agreement. Tr. 648. The mere fact that later accountings were to occur poses no *ipso facto* case for liability as to each and every possible contention, and certainly not for contentions contrary to the clear understandings of the negotiators and the clear import of the Agreement.

The Testimony of Mr. Carmouche

Mr. Carmouche, quite an experienced oil and gas attorney, also testified concerning his recollections and impressions as a negotiator of the Interim Agreement and as to customary understandings of oil and gas contract terminology. Tr. 681 *et seq.*

He testified to his understanding at the time that the agreement did not call for refund of Zone 1 revenues. Portions of his testimony at Tr. 682 are so succinctly clear that they are best quoted *in extenso*:

> Q. Was it ever your understanding that the fact [sic-effect] of the Interim Agreement would be upon a final adjudication of title matters to confer retroactive rights to mineral revenues in Zone 1 upon the United States government?
>
> A. No, sir, it was not.
>
> Q. Was it your understanding that this agreement was indeed an Interim Agreement, as it was styled?
>
> A. Yes.

Q. Is it unusual for the State of Louisiana to enter into agreements in contested title matters, or even matters which have not actually gone to court, but matters which might go to court, questionable title problems on an interim basis with actual or possible title opponents to decide mineral participation on an interim basis?

A. It is very usual for us to decide on an interim basis.

Every lease that I had anything to do with the State of Louisiana from 1955 or on was in the nature of a quitclaim or a non-warranty lease and, as Mr. DuPuy previously testified, all of the lands owned by the state within a given area.

So we had that double protection, that we would not have to refund.

Q. Now, after such leases were granted would there be problems of unitization and participation of units?

A. Yes.

Q. And these agreements in which participation and title questions were resolved with particular well and lease participation purposes—were they on an open ended basis very often?

A. Normally, yes.

I know of only one or two instances that were not open ended in some twenty years.

Q. What do you understand open ended to mean?

A. It means that at anytime either party can come in, if the law changes or if the factual situation changes, and that the agreement is cut off and then prospectively the rights of the parties are determined.

Q. Would the negotiators for Louisiana from this kind of background have had this kind of general understanding of how these title matters can be adjusted on an interim basis?

A. Yes, sir.

Q. Were there any of the documents that you can recall in the Interim Agreement attachments and the negotiations leading up to the Interim Agreement which called for possible refund to the United States on monies Louisiana had received or would receive in Zone 1 before any final decree in the title in this case?

A. I know of none, sir.

In fact, all of the negotiators felt that there would be no refunds in Zones I or IV.

The language in the Interim Agreement as to the handling of Zones I and IV is identical.

I thoroughly agree with Mr. Petty [a federal official] when he testified this morning that they had no intention of refunding anything in Zone IV and they made no accounting, weren't obligated to do so.

We feel the same way about Zone I and felt that way in 1956.

The Testimony of Mr. Bonnecarrere

Mr. Bonnecarrere, the long-time secretary of the Louisiana Mineral Board, also took part in the 1956 negotiations. He testified, corroborating the recollections of Mr. Dupuy and Mr. Carmouche that the negotiators understood no refund liability would exist for Zone 1. Tr. 695-696.

> Q. Did you hear the testimony of Mr. Carmouche concerning the understandings of the negotiators as to the Zone 1 and Severance Tax matters?
>
> A. I certainly did, yes, sir.
>
> Q. Did you also hear the testimony of Mr. Dupuy in this connection, sir?
>
> A. I certainly did.
>
> Q. That testimony relative to the matter of the understanding of Louisiana's negotiators as to Zone 1, possibilities of payment of refund liability to the United States, do your recollections accord with that?
>
> A. Completely.
>
> * * *
>
> My full appreciation was that we were not required to refund any monies from Zone 1, as the federal government was not required to refund any monies as to Zone 4 during the Interim Agreement.

He also testified to *the United States* being a party

to many so-called "open ended" agreements where it is customary to give effect to changes on a prospective, not a retroactive basis, when an agreement might be changed by new facts as happened in Chapman Line position changes based on new map work. Tr. 697-698.

Again, he gave his recollection of the understanding that no refund liabilities would exist for Zone 1 and Zone 4, and that is what "for the purposes of the agreement" meant in the non-prejudice clause. Tr. 712-713.

He noted that the real purpose of the non-prejudice clause was to permit the parties to deal with survey problems, or the problems of "little slivers" of territory involved in accurate location of the Chapman Line, (such as both parties negotiated in this very accounting proceeding). It was never contemplated that whole leases might be claimed *retroactively*, although positions might be changed *prospectively*. *See* Tr. 714-715.

D. The testimony of a federal advocate proved futile to the Government, being based upon irrelevant pre-1956 documents and strained legal positions outside of the witness's expertise.

A career federal boundary advocate was the only member of the federal Interim Agreement negotiation team who gave testimony on his understanding as to the matter of whether Louisiana would be entitled to retain Zone 1 revenues. He admitted he was not expert in, and knew nothing of, oil and gas terminology and law. *See* Appendix 1. However, his testimony related to his under-

standing of an oil and gas contract and the law underlying it.

That understanding was grounded on basically two points. First, he construed the Outer Continental Shelf Lands Act as prohibiting any waiver whatsoever of any federal rights. The cross examination, Dep. Tr. 49-82, demolished that incredible legal stance, and it was ignored or rejected by the Special Master. Now, in its brief, to avoid the general taint that a particularly untenable posture confers upon a case, the Government has conceded that this first line of reasoning was erroneous, but attempts to dignify it as reflecting a negotiator's state of mind. Government Memorandum, p.18, note 7. While erroneous state of mind evidence of a negotiator may have some miniscule weight, it cannot be much under these circumstances: self-serving testimony of a former advocate in this case, supported by patently incorrect legal reasoning, uncorroborated by other federal witnesses who were oil and gas experts, and further supported by other strained or suspect reasons.

That brings us to the second major line of reasoning of this witness: his other reasoning that the documentary history accorded with his construction of the Zone 1 provision of the 1956 Interim Agreement. Cross-examination showed that the documents relied upon were mostly dated before the 1953 Submerged Lands Act Grant of the three-mile belt and were all dated long before the 1956 negotiation which brought Zone 1 rights into existence. Dep. Tr. 49-54. Post 1956 documents were not in fact used. Dep. Tr. 55.

II. RESPONSES TO PARTICULAR GOVERNMENT ARGUMENTS

Having presented its case and generally responded to federal argument, Louisiana now addresses a limited number of particular Government arguments. Space considerations make it impossible to treat all of the many arguments and innuendoes. Such limited response should not be construed as an implied concurrence in any particular federal arguments not specifically answered.

A. Finality of this proceeding

The Government states this is the final chapter in the litigation instituted in the 1940's. This is not a chapter in the 1948 case. It is merely the most recent chapter of a later related case. If temporary partial arrangements or deferrals of problems cannot be later efficiently resolved by argument, yet other chapters or another case may ensue. In any event, a final decree and further accounting must be had, in regard to split leases and other matters whereby the Government holds and refuses to pay or invest more than thirty million dollars of Louisiana funds. Louisiana cannot assure the Court that the Government will do what is lawfully required and no more litigation will ensue. These remarks are made merely to show non-acquiescence in the validity of this Government posture, because the question of what is the last or final matter in this case could have serious impact on important matters vis-a-vis third parties, *e.g.* tax collection suits awaiting a final decree.

B. The federal argument that the Zone 1-Zone 4 provision was one-sided is not persuasive.

The Government repeatedly argues, *e.g.*, *see* Government Memorandum, pp. 9-10, 24, that Louisiana's view of the meaning of paragraph 6 of the Interim Agreement cannot be correct for that view is "one-sided" in favor of Louisiana. It is argued that the Government would have no reason to agree to a clause against the Government's interest. This argument is at odds with the plain language of paragraph 6 that *both* governments received rights as to Zones of like character, 1 and 4. *All* leasing had been stopped in 1956, including leasing in the undisputed areas Louisiana owned and also in the undisputed area the United States owned. However, *both* undisputed areas were tied up by the injunction halting both drilling and leasing because of uncertainties of boundary. Whatever the odds of success or failure may have been in Zone 1 compared to Zone 4 is irrelevant. Everything was halted. An agreement which identified the undisputed areas, lifted the injunction affecting *both* governments, and enabled *both* governments to proceed with leasing was indubitably a matter of mutual benefit. To argue otherwise is to take undue liberties with truth. It is unimaginably audacious to so argue in the face of innumerable other general benefits flowing to both governments from the total Agreement, which would sustain even one-sided particular phrases. Opening up Zones 2 and 3 to development and leasing that has generated tens of billions of dollars of revenues was no small consideration, *e.g.*, $1.9 billion was procured by the United States in a single November 28,

1979 lease sale. Scores of federal lease sales were made possible by the agreement over the years of its life, and most of the federal offshore lease revenue comes from these Louisiana areas. A goodly part of present national energy production exists today, thanks to the Agreement. The one-sided analysis is certainly not serious. Perhaps its only virtue is to suggest that the overall results of the litigation have rather one-sidedly favored the United States.

C. The "disingenuous" charge by the Government to counter the lease description argument of Louisiana avoids facing the evidence and is contrary to the Master's findings.

By asserting, *ipse dixit*, without reference to a scrap of evidence, that the lease descriptions "encompassed also, or indeed primarily, areas ultimately adjudicated to the United States," the United States dismisses the Special Master's concisely reasoned findings of fact to the contrary. It does this by assuming or stating "facts" for which there is no supportive evidence. Government Memorandum, p. 28, n.16. Paradoxically, the Government does this while insisting that the problem resolved by the Special Master was not an issue of fact, and saying "indeed, the Master relied entirely on the statute for his conclusion, without purporting to resolve *any* factual dispute." [Emphasis added.] Government Memorandum, p. 7. Then the Government argues an alleged "incorrect" resolution made of a factual dispute as to whether the leases of the Zone 1 controversy included only State lands or also federal lands. Frankly, Louisiana is at a loss to understand just what are

the Government's contentions, given such internal contradiction.

Next, the Government reasons that Louisiana leased the federal areas in Zone 1 by noting that Louisiana claimed and had the power to lease Zone 1. In this context, mere power to lease is irrelevant. Power to lease doesn't mean the power has been exercised over any given area.

From these circumstances the Government concludes it is "disingenuous" of Louisiana to argue that the Zone 1 federal lands within the lease description were not leased. This adroitly assumes an unreality, without considering evidence. Not one word of the leases is quoted to show that there were in fact federal lands within the lease description. The whole point of the Special Master's finding was that the evidence was overwhelmingly clear that the federal lands were *not* described in the granting clause of the lease. Merely stating the opposite view convincingly, without resort to evidentiary analysis, proves nothing. Figure 1, *supra* p. 3, graphically shows the true use of vicinity maps or vicinity areas merely referred to in state lease descriptions. There was nothing disingenuous about this. It was routine Louisiana practice as testified to by several witnesses. Appendix 1 treats the evidence in detail as to lease description language. See also discussion of testimony of Messrs. Dupuy, Bonnecarrere and Carmouche, *supra*. Part of the argument above also treats this fact matter.

The effort to label the normal leasing practice as a mere non-warranty device uses the Government's words,

not Louisiana's. A Louisiana witness testified that both non-warranty provisions *and* quit claim-type descriptions of leasing are used as a *double* safeguard in routine practice, not that the quit claim description was a mere warranty device. *See* testimony of Mr. Carmouche, Tr. 682-3. The Government perverts this to say that the description method was a warranty device. That is not so, but if it were so, still this does not mean the Government lands were included in the description of lands leased. Whatever the reason, the federal lands were not described in the granting clause; therefore the federal lands were not leased and are *not* the source from which the funds were derived. The patently inaccurate arguments of the Government here and those discussed above, bring to mind the words of Mr. Justice Black, joined by Mr. Justice Douglas, who said:

> ". . . it is difficult to understand why the Federal Government is subjecting the State of Louisiana and this Court to a long series of technical and wasteful law suits." 394 U.S.11, 85, n.2.

D. The prior decrees and decisions are incorrectly represented as to content and significance in the Government arguments.

Finding little comfort in the language of the June 16, 1975 Decree, which actually governs this proceeding, the Government marches into a miscellany of irrelevant charges and some past Government successes that are incorrectly represented. A fair examination of the actual circumstances of the history of various decisions and decrees

shows nothing of real comfort to the Government's present case. See the history more generally developed in the Statement of the Case and in earlier argument, which shows that the Government relies for its Zone 1 case upon decrees and decisions which did *not* adjudicate Zone 1 problems, which deferred accounting problems, which reserved Louisiana's rights under the Interim Agreement or which otherwise were useless to the Government's case. Let us examine some examples of these invalid attacks.

Louisiana is attacked for not urging in 1949 and thereafter certain defenses derived from the 1956 Interim Agreement until the 1975 accounting ordered by the Court. This attack is an example of the irrational avoidance of context. This chronologically absurd attack is presented with such bravado that its simple illogic is somehow obscured. Government Memorandum, pp. 10-11. It is plain nonsense to lambast a litigant for not arguing or doing in 1949 what was not appropriate until ordered in 1975. Let us more closely examine these decisions and the particular attacks based thereon.

The 1950 decision reiterated what was already obvious, and what no one quarrels with then or now. That is, normally, mineral revenues belong to the owners of land. However, there are a thousand and one exceptions to this rule such as the effect of good faith. As the Government puts it, "in deference to the States," the accounting date was set at June 5, 1950, but this was not mere deference. There were good faith dispute concepts. Presumably, the Government thinks this was merely some kind of courtesy. In fact, a principle was being applied. The Court did *not* retroactively punish the States by im-

posing damages for exercising supposed rights that the Government itself had not challenged for more than twenty years.

In sum, the first decree did not establish absolute *universal* liability for extracting minerals on property of another. Implicitly, if not explicitly, by the 1950 decree, 340 U.S. 899, the *status quo pendente lite* was recognized, for it imposed no liability prior to the decision date. The Interim Agreement, in its Zone 1-Zone 4 language, recognized this principle also. Where matters were in controversy, and uncertain until decided, the parties were not fairly on notice. *See* the explanation, 363 U.S. at 83, n. 140, in the 1960 decision, that until the 1950 decision date, the states were not really on notice.

Even more seriously, Government use of the 1950 decree and decision obscures its irrelevancy for Zone 1 matters, for the State three-mile belt confirmation occurred under the Submerged Lands Act of 1953, cited *supra*, "releasing and relinquishing" prior federal rights. The extent of these rights was the subject of the 1956 Interim Agreement, which granted further contract rights authorized by the OCS Lands Act.

The casual assumption that the unrestrained duty to account for all mineral revenues derived from the area of the United States "remains the governing rule" is the essence of the Government posture, p. 12. Many irrelevant citations later, after talking around the Submerged Lands Act, the Government then uses a general observation in the 1960 *decision* on the three-league problem (which certainly did not affect Zone 1) in the consolidated Gulf

Coast States cases, to say that the immutable "rule" of the California case was unchanged — still the United States was entitled to an accounting. In a triumphant swipe at the purported "failure of the Special Master to explain how that circumstance tallies with his ruling," the Government invokes the 1960 decision ". . . as settling that the Submerged Lands Act itself in no way modified the State's obligation to account for" revenues beyond the grant of that Act, Government Memorandum p. 15.

The Government has lanced straw men, not real problems. It was the OCS Lands Act that authorized agreements to deal with coast line controversies, not the Submerged Lands Act, as the Government finally conceded with "surprise" at p. 10. As far as implying that the chronological revelation showed that the Master had erred, it does not. The Special Master simply read a little more of the Court's words which went on to say in the 1960 decree, 364 U.S. 502, that the Interim Agreement was to be followed as to Louisiana (paragraph 3) and jurisdiction was reserved to render further decrees to give proper effect to the 1960 decree (paragraph 8). Then, at 382 U.S. 288, the Court said in the December 13, 1965 decree

> For the purpose of giving effect to the conclusions of this Court . . . in its opinion, announced May 31, 1960, and the decree entered by this Court on December 12, 1960, it is ordered . . .

that nothing was to prejudice rights regarding the remainder of disputed areas or under the Interim Agreement (paragraph 10) and the Court retained jurisdiction to entertain further proceedings, including "further ad-

justments of the accounting." Then, in its 1975 Decree, the Court quite explicitly and forcefully reserved Interim Agreement rights (paragraph 13), saying not only that there should be no prejudice to such rights, but it remained in effect except "as explicitly modified hereby."

These details of the Court's decrees substantiate the validity of the Special Master's implicit finding that these belated Government arguments, emanating only now from the Solicitor's office, suggest unfamiliarity with the minutiae that were examined in the trial proceedings.

Again, either deliberately glossing over evidence or displaying vast voids of understanding of the trial record that clarified the Interim Agreement beyond question, the Government plods on, claiming there is no basis in the precise letter of the Interim Agreement for Louisiana's position. Government Memorandum at pp. 18-19. This ignored custom, background, and contemporaneous construction testimony, discussed elsewhere in this memorandum.

The Government does, however, finally admit, p. 18, what it would not admit in the trial proceedings — that the Government had statutory power to make Zone 1 agreements under the OCS Lands Act. (Incidentally, this undermines one foundation of the Report on the use of the money issue.) Then it quickly jumps to an alleged illogic of the Louisiana argument, saying "There is no word of the Interim Agreement that can be pointed to as accomplishing this waiver," before pointing to some words of the Agreement which, with others, do accomplish the waiver, to wit, the grant of "exclusive supervision and ad-

ministration." In failure to give these words import, the Government here forgets its earlier tactic of going back to the decrees and history. In *United States v. California*, 332 U.S. 19, the controversy, as to the Government's rights, had been couched in terms of purported "paramount powers." While not in any way recollecting this historical curiosity where it is relevant in construing the Interim Agreement, paragraph 6, the Government Memorandum, p. 4, n. 4, did passingly refer to this bit of legal history, citing 339 U.S. at 724 (sic-704). There the Court observed

> The question here is not the power of a state to use the marginal sea . . . it is the power of a state to deny the paramount authority which the United States seeks to assert. . . .

See also the "paramount power" phraseology of the 1950 decree, 340 U.S. 899, and Justice Frankfurter's dissent in *California*, 332 U.S. at 41, and *Louisiana*, 339 U.S. at 706.

Indeed, given the development in many opinions and decrees since those days, this problem seems a bit quaint now, but it does show that the negotiators in 1956 would have had technical reservations as to whether they were dealing with imperium rather than dominium power. Even now, the Government says "ownership" and "title," strictly speaking, "may not be correct usage." Government Memorandum, p. 4, n. 2. So it was that the more semantically conscious lawyers of another time wrote of the "exclusive supervision and administration" to negate the rights of the other government, for it was likely thought that all the Government may have had was mere imperium

power and the 1950 case had *not* negated Louisiana's ownership. Thus, in the legal setting of 1956, "exclusive supervision and administration" (imperium) was the source of the dominium power to lease. In 1956, for lawyers to use those words meant a Government could lease and keep the money, for those concepts were what the 1947 *California* and 1950 *Louisiana* cases focused upon.

Certainly, the analysis accords with the interpretation of the parties. See the uncontroverted testimony of Louisiana's witnesses discussed *supra*, and the findings of the Special Master, Report pp. 17-19, quoted *supra*, on the parties' understanding that the Interim Agreement conferred, in paragraph 6, the power to receive *and retain* lease rentals. The rights of dominium, stemming from contested imperium, were what the litigation was all about.

E. The Outer Continental Shelf Lands Act attack of the Government is erroneous

The relevance of certain Outer Continental Shelf Lands Act provisions has been affirmatively presented earlier, to show *both* the authority for the waiver or grant of rights by the United States in the Interim Agreement and also to show that payment to Louisiana by a lessee was constructive payment to the United States. Certainly, this was also confirmed by practice found by the Master and by other provisions showing that after termination of leases, the Interim Agreement was to remain in effect and showing that monies payable prior to forfeiture under a lease were to be paid pursuant to the Agreement even after

the Agreement ended. Paragraph 11 (c), Interim Agreement.

These arguments need not be reiterated at length. Instead, we simply correct the federal effort to connote that the Special Master's Zone 1 finding hinges *only* on the issue of whether this *additional* supporting reason is sustained. *See* Government Memorandum pp. 5, 26-27. Suffice it also to note the plain error of the notion that the OCS Lands Act does not affect state-federal relations or rights, only federal vs. lessee rights. This is unconvincing, from a party who simultaneously admits the Act's provisions permit and affect federal vs. state legal relations, if an Agreement were in fact made. Government Memorandum, p.18.

F. The facts and the ambulatory provisions of the coast line decree destroy the Government argument that the coast line is immutable.

The Government makes a "past and present coast line" argument, Government Memorandum, p. 35. That argument utterly ignores the ambulatory boundary ruling of the Court in 1969, 394 U.S. 11, 32-34, which was embodied in the important Appendix B of the Decree. That appendix presented an array of areas of coastal change for various sectors over different periods. While merely noting exceptions to the "past and present" language of the Decree, the Government failed to analyze how those important exceptions impacted its argument.

It had an absolute void of evidence to sustain its

burden of proof that the areas it claimed to have won in Zone 1 were not the same areas of coastal change involved in the execution of Appendix B. The Special Master found, and correctly so:

> The burden of persuasion is therefore upon the Government. Report p. 15.

The Government itself referred to the areas involved in its Zone 1 claim as "slivers" related to survey problems, p.23, and noted the final determination involved "meanders back and forth across the old Zone 1-2 line," p. 17, citing in n. 6, the East Bay and Ascension Bay areas as the substantial "bulges" affected by this meandering.

Of course, it was precisely those "bulges" which were the areas involved in the two areas referred to at p.35 as exceptions to the"past and present coast line" language of the decrees. *See* Appendix B of the Decree. Most of the Zone 1 money was from these oil-rich "bulges" of the changing coast line provisions of the Decree; thus, it is understandable why the Government made no effort to carry the burden of evidence and persuasion it had to sustain to show the exceptional provision did not apply. As noted above also, the Government's own arguments now substantially show it *could not* have met that burden. Thus, the many decree analyses founder on the facts.

III. THE GOVERNMENT ZONE 1 ARGUMENT USING DECREE LANGUAGE SUPPORTS LOUISIANA'S EXCEPTIONS ON LIABILITY OF THE GOVERNMENT FOR ALL SUMS DERIVED FROM LOUISIANA'S LANDS.

A. A statement of the basic rationales of Louisiana's Exception regarding financial benefits and the Government's Zone 1 Exception

Louisiana's Exception claims, in essence, that benefits derived by the Government from use of Louisiana's oil lands monies are payable under the Decree's terms. The basic Government Zone 1 argument supports this Louisiana Exception. That argument is simply this. The plain language of the Decree (the Government says) generally imposes liability on each government for *any* sums derived from or on account of the other's lands or minerals. Louisiana does not challenge this basic rationale of the Decree's import, except to the extent that the Court's own decrees made exceptions or imposed limitations. Rather, Louisiana defends the Zone 1 claim by *inter alia* pointing to the exceptional and limiting language of the decrees, and especially paragraph 13 of the Decree of 1975, reserving Interim Agreement rights.

Then Louisiana also establishes its Zone 1 rights or shows that on the facts, the monies claimed were not from Government land. However, the Government can point to nothing in the 1975 Decree, nor in the 1972 and 1965 decrees adjudicating territory to Louisiana (by use of the phrases relied upon by the Government), which contained

any reservation or exception of contract rights that the United States can rely upon to claim it is privileged or excused from refraining to account for benefits derived from or on account of Louisiana's lands.

Thus, it really matters not whether the Interim Agreement conferred no right to claim interest. It matters not whether general statutory law or jurisprudence is to the effect that interest generally cannot be recovered in contract claims against the Government. It matters not if the array of particular contract and general legal arguments in support of Louisiana's Exception to the Report are all rejected. Certainly, we do not admit (nor need we here assert) anything about the points referred to above in this paragraph.

What we do assert and what does matter is that the Government enjoyed sums which were derived from or on account of Louisiana's lands, to wit, financial benefits from the use of the funds derived from or on account of the Louisiana lands and minerals. It is *res judicata* that *all* such sums should be paid over to Louisiana, including such sums as are calculable as financial benefits derived from the use of or on account of Louisiana's lands and minerals. This, indeed, is a rationale the Government logically must concur in, for it is its own Zone 1 rationale. This claim need not stand on the Interim Agreement, nor on statutory law. Unless the claim is negated by the Interim Agreement, the Government defenses to Louisiana's Exception all fall. Thus, mere failure to provide for interest in the Interim Agreement is no defense, for this is not a contract claim for interest. It is an adjudicated decree claim. The Government's Zone 1 rationale tells us

such a decree claim is valid, for that Zone 1 rationale maintains it is enough if the 1975 Decree, or any prior decree, imposed liability for sums derived from or on account of the other's land. These points are even clearer when amplified by background and detailed analysis.

This discussion relates to the fact that the United States indirectly derived large sums from lands won by Louisiana, as a result of financial benefits from holding and using Louisiana's mineral revenue. The holding and use of these monies generated some $88 million of benefits and unjust enrichment to the Government by reason of its failure to invest the money at interest, *even after formal request and demand. See* Louisiana's Exceptions to the Special Master's Report.

It is submitted that the federal logic on monies "derived from" lands applies not only to monies *directly* derived from or on account of the other's land, but also to monies *indirectly* derived through the long usage of the funds, which qualify as "sums derived" "from or on account" of State lands.

Thus, irrespective of the decision on the trust, fiduciary, escrow, unjust enrichment or other supportive legal questions associated with the Louisiana Exceptions, which show federal liability under the Interim Agreement, Louisiana is entitled to have those Exceptions sustained by the clear and simple language of the Decree, under the logic of the Government's Zone 1 claim. Given Louisiana's special Zone 1 contract defenses, the Government has clearly failed to prove the sums it claims from Zone 1 were truly

derived from or on account of Government lands. However, the basic rationale of the Government Zone 1 argument sustains Louisiana's Exception on the use of Louisiana's money. That rationale employs the Decree language of "derived from" the Government's land to make a most expansive and liberal claim stemming from the Decree language. That Government claim, in essence, is that mere derivation of benefits from the other government's land imposes liability. This was even stretched to maintain that mere presence of Government land in a vicinity tract map results in lease revenues from state lands being derived from federal land. *See* figure 1 *supra*, reflecting the facts found by the Special Master, Report pp. 18-19.

B. The Government emphasis on the controlling character of Decree language redounds to its disadvantage

Purporting to use without urging need to overturn the Special Master's fact findings, the answer to the Zone 1 problem, the Government urges, turns *only* on Decree and Agreement construction. Government Memorandum, pp. 7 and 8. See also the reliance on the "derived from areas" Decree reasoning, pp. 2 and 11, which, of course, applies in reverse to the companion clauses of the Decree and Interim Agreement imposing federal liability to the State. Thus, to paraphase Government argument, p. 11, one may say "Since the very beginning, one object of this litigation has been to require the United States to account for, and pay over to Louisiana, sums derived by the United States from State submerged lands."

C. The Decree provision "sums derived from" encompasses more than mineral lease revenue per se

Note, we have said "sums," a much broader term than the word "revenues" used in the Government language about Zone 1, because "sums" *is* the language of the Decree and clearly means that sums claimed do not have to be "revenues," but need only be derived from or on account of the other party's lands.

D. Output liability provisions of the decrees are not confined to funds which were "payments," unlike the input obligations of the Interim Agreement.

This analysis of the importance of the word "sums" is reinforced by contrasting the broad language of the Decree's property adjudication clauses and the language of the Interim Agreement contract rights and responsibilities. Thus, in paragraph 7 (a) of the Interim Agreement, on contract duties, the Government was directed "to impound . . . a sum equal to all bonuses, rentals, royalties, and other payments . . . paid to it for and on account of each lease. . . . Thus *only payments* to it, from leases were involved. But, by contrast, the *output* or liability provisions of the Decree show that the United States was ordered to pay in much *broader terminology* than merely turning over *payments* made to it from leases or other grants. It was ordered to account in paragraph 6 (b), for

> . . . *any and all other* sums of money derived by the United States either by sale, leasing, licensing exploitation or *otherwise from or on account of* the lands,

minerals or resources described in Paragraph 3. . . . [Emphasis added.]

It is submitted that the money the United States saved by enjoying Louisiana mineral lease money from Louisiana's lands and minerals was derived from or on account of the lands, minerals or resources of Louisiana, for it was a clearly unearned proprietary benefit derived from another's property. It is utterly immaterial whether the Government was authorized to hold such monies. The benefit was causally a sum derived from or on account of Louisiana lands and minerals, and that's that.

E. The Government Zone 1 argument that defenses not previously urged are cut off by the decrees unless particularly excepted by the decrees sustains Louisiana's Exception on the financial benefits question.

If the Government had defenses to this proposition, it should have asserted them in earlier phases of the matter. Again, Government arguments return to haunt it. See Government Memorandum, pp. 11 and 14, maintaining that language of prior Decrees is applicable and decided the Zone 1 matter. This reasoning has no serious effect against Louisiana for a number of reasons, *inter alia*, that contract rights were reserved to Louisiana under the 1960, 1965, and 1975 decrees and the Court had reserved powers in all prior decrees to thus supplement the earlier decrees. No such contract rights argument is urged by the United States. In contrast to Louisiana's position, the Government cannot point to *any* language in the In-

terim Agreement granting it an exception from the very broad accounting obligations ordered in the Decree.

F. The impoundment provisions imposed duties and did not confer rights on the Government to use and enjoyment of the monies, unlike the Zone 1 provisions which did clearly confer rights of use derived from executive right theory

Indeed, the Special Master found no free interest or interest charge language in the Interim Agreement. This is understandable. There was no free use of the money rights conferred by the Agreement. As noted in the discussion above, the impoundment *obligations* did not confer rights to all sums derived from leasing but related to *duties* the *United States had agreed to.* For instance, paragraph 7 (a) of the Interim Agreement provided ". . . the United States agrees to impound. . . ." Unlike Louisiana's Zone 1 defense to the Government's argument, there was no exclusive right granted to the Government in the Interim Agreement to lease the lands ultimately adjudicated to belong to Louisiana. *See* argument, *supra,* regarding the fact that an executive right is an *exclusive* right to lease lands belonging to another, and only such *exclusive* rights carry with them the right to receive and retain revenues derived from the leasing. The leasing powers in Zones 2 and 3 which the Government enjoyed and from which areas all of the impounded monies were derived, were governed by paragraph 13 of the Interim Agreement. The Government's powers there granted were *not* exclusive but were shared with Louisiana. Thus, joint agreement was

necessary on the need to prevent drainage in Zone 2, before the Secretary of the Interior could grant a lease there. "Otherwise . . . the injunction against new leasing shall continue . . . as to that area."

All leasing pursuant to paragraph 13, even as to Zone 3 leases, required concurrence from a committee of State and federal appointees, who passed on the adequacy of the bids.

All sums payable were to be impounded pursuant to the Agreement, and under paragraph 9 (b) :

> Any funds derived from an area finally determined to be owned by the State of Louisiana . . . shall be taken from the separate and impounded fund in the Treasury of the United States . . . [and] paid to the [Louisiana] official or agency then designated by Louisiana law to receive such payments. . . .

G. The impounded fund payout provisions of the Interim Agreement accord with the Decree's language and are not exceptional, as they also show broad liability to pay funds derived from State areas.

Note again that the payment or output liability from the impounded fund was not limited to *lease payments*, as with the input provisions of the Agreement. Rather "any funds derived from an area . . . shall be taken [and] paid to [the State]." *Any funds* derived from *an area* means what it says—*any* funds derived not merely from leasing in an area but *from* the area; ultimate causal relation is all that is necessary. Thus, even if there were sums derived by the United States from State areas which were

supposed to have been impounded but were not, the United States was obliged to pay them from the impounded fund, whether or not derived from leasing. The value of the use of Louisiana's lease monies was, however, clearly derived from leasing, and the United States was thus obliged to pay even if the source had to be from leasing.

H. The language of the various decrees supports the applicability of the Government Zone 1 argument to Louisiana's Exceptions.

The language of the Decree, paragraphs 5 (b) and 6 (b), shows that whether the Government obligation is approached as an impounded funds accounting problem or an unimpounded funds accounting problem, the broad Decree language supports Louisiana's Exceptions.

Turning to prior decrees, we note and use this Government method of urging their force, and analyzing the import of them as background. When the Court first adjudicated theretofore Government-claimed areas to Louisiana, it ordered in paragraph 7 (c) of the December 13, 1965 Decree, 382 U.S. 288, that the United States should pay Louisiana impounded monies "derived from or attributable to" the lands of Louisiana, and further ordered in paragraph 7 (d) an account of

> . . . any and all other sums of money derived by the United States by sale, leasing, licensing, *exploitation* or *otherwise* from or attributable to the lands, minerals or resources [of Louisiana]. [Emphasis added.]

Note that in the 1975 Decree, instead of "from or attributable to," the language was enlarged even further to read in paragraph 6 (b) "from or on account of." Thus, there was an *enlargement* in 1975, to emphasize the connotation of financial accounting and actual causation. If "sums" (not necessarily payments—but abstractly calculable "sums") were *either* derived *from* or *derived on account* of the land, then the United States was to be liable. Clearly, the sums didn't have to be derived from the land, didn't even have to be payments to or cash received by the United States, didn't need to be attributable to the land, but only had to be on account of the land.

It is simply impossible to deny that the time value sums Arthur Andersen & Company's experts found to be the value of the Government's use of Louisiana's money were neither derived from, nor on account of, nor attributable to Louisiana's land. There was an unearned benefit to the Government from Louisiana land by use of Louisiana's mineral revenues from that land, a use that was gained through the issuance of an injunction obtained by the United States that was illegally issued as to Louisiana land.

Such time value injury or benefit from an improvident injunction related to a wrongful damage from the use of another's property rights, and is not an interest claim per se. *See Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 182 N.Y. L.J. 84 (1979), a recently decided New York case. It presents a damage claim for the use of another's property.

There, Merrill Lynch had used California banks to

pay monies owed to New York customers, thus benefitting to the amount of hundreds of thousands of dollars from the use of the money resulting from the "float" connected with the long distance, out-of-state banking. There was no right to interest by contract or statute. A class action was instituted by the New York customers. A proposed settlement was rejected because it did not include a *damage* award for use of the money. Damages were recognized as required on the basis of the value of the unnecessary usage of the customer's monies, measured by the financial benefit to Merrill Lynch and the financial loss to the customers. This was calculated by calculating interest saved on interest lost, but it was not interest per se. It was damages for the wrongful use of the money.

While this is not a controlling precedent on the United States Supreme Court, its principles are impeccable. They dovetail into the reasoning the Government has misapplied in the Zone 1 matter, but which perfectly well applies to establish Louisiana's claim for use of Louisiana's money. The profit derived from or on account of an unnecessary retention or use of funds derived from land ought to be paid to the owner of the property.

This is simple justice. A lower court New York State judge should not stand above the Justices of the United States Supreme Court in service of justice. Indeed, he does not, for this Court's prior decrees, if literally read, afforded justice to this type of claim long ago.

IV. THE TENOR OF THE GOVERNMENT MEMORANDUM OBSCURES VALID EQUITABLE AND POLICY CONSIDERATIONS.

Repeatedly, the Government gratuitously tosses into its Memorandum centuries-old historical facts which it perhaps surmises are the most tenuous claims made by Louisiana during the course of this litigation.[76]

We ask the Court to evaluate the case not on the arts of advocacy, but to examine the law and the evidence. The Government, perhaps mindful of the old lawyer's maxim to argue equities when law and facts are against you, would castigate Louisiana with overstatements, untruths and charges of bad faith delay. *E.g., see* Government Memorandum, pp. 6-7. Thus preoccupied, perhaps no one will notice the great inequities or inconsistencies in the Government's own posture.

It maintains to the Justices of this Court that it is entitled to the free use of Louisiana's money, while citing no explicit grant to that free use, as none exists. At the same time, it contends that the same Agreement conferring *exclusive* power in Louisiana (over an area that was clearly 99% Louisiana property anyway) was really an illusory benefit, for it is claimed that revenues thus derived were to be later paid back to the United States. It blithely ignores the uncontroverted testimonial evidence, relying principally upon bald factual assertions contradicted by the

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[76] We do not exaggerate. The Government even disturbs La-Salle's surveying errors in—was it the eighteenth century—and speculates about the import of what some lawyer said about that error in 1958. *See, e.g.,* Government Memorandum, p. 22, n.11.

actual evidence and the Special Master's findings. The only "testimony" it relied upon was the self-serving, excessive arguments of a career federal advocate, inexpert in the field.

The simple equities of the matter are thus obscurred. Those simple equities are as follows. The Interim Agreement gave both Louisiana and the Government the very same Zone 1 and Zone 4 arrangement, but that arrangement benefitted the Government infinitely more than it did Louisiana, for it lifted the injunction as to a vast federal area dozens of times wider than Louisiana's miniscule Zone 1 three-mile strip. Now, a quarter of a century later, after the money was expended, the Government having received billions upon billions of dollars from Zone 4, persists in picayune parsimony. It is still chipping at Zone 1, seeking revenues from hundreds of petty slivers of Louisiana's three-mile strip, and using tactical ploys to that end which are ill suited for putting at rest the long disturbance that this litigation has caused State-federal relations.

Justices Douglas and Black were right in advocating the wisdom of a more outward line that would have prevented this and future controversy. *See* 394 U.S. 11 at 85. The relatively small extra areas the State would have gained would have meant little to the nation compared to its vast Outer Continental Shelf. But that wisdom did not prevail then, and no reversal is practical now.

But, in a more modest form, that wisdom should yet prevail, for if Louisiana were to succeed in having the simple equities of its relatively modest and well-documented Zone 1 and use-of-the-money claims upheld, the

tenacious, decades-long assault upon our territory and resources, forcing us to defend inch by inch, well by well, dollar by dollar, new theory by new theory, can be mitigated. We never wanted this. We wanted a broad-brush peace-making solution.

Agreement on the ambulatory boundary, on split leases, on the final decree, and on the future of State-federal collaboration on Outer Continental Shelf exploitation and coastal impacts would be greatly eased if charges are not forever hurled about and the climate electrified with excesses of advocacy. It can end. Let it end. Let us win a little, for then the atmosphere would exist in which agreements could be reached on details that were too much even for a Special Master to put to rest.[77] Only a spirit of co-

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[77] The Special Master was not called upon to resolve numerous more or less mechanical applications of his rulings or those of the Court, nor was he called upon to resolve several matters left open by the Decree. The Government Memorandum, pp. 40-41, n. 23 and 24, presents matters that are not truly germane to the Exceptions before the Court, which treat only selected parts of such matters and certain errors. There are also proposals to handle matters in ways at variance with the Decree or Agreement regime. *See* n. 24. Elsewhere in the Government Memorandum, there are other ventures into accounting minutiae, *e.g.* p. 5, n. 3, which also assert positions implying or stating the consequences to result from the Court's rulings. These data ignore sums accruing after the Decree from split lease revenue still being impounded, and sums excepted or deferred under the Decree. They also ignore other matters that must be resolved by subsequent application of the accountings which have long been filed and of record.

It seems unwise to anticipate the mathematics of the calculations to be made by the accountants after the Court's ruling. There is no reason to disturb the prior understanding and agree-

operation between governments can overcome remaining problems of split lease accounting and many others. Such

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ments of the parties that a ruling on the three issues submitted to the Special Master will enable the accountings to be completed. The partial injection of accounting minutiae into these proceedings will not eliminate further out-of-court accounting and decree drafting negotiations by the parties, *e.g.* as on post-Decree revenues, split lease matters, and details of final decree form.

It is unseemly and serves no legitimate purpose to present proposals and counterproposals for waiving Agreement provisions to the Court. Policy arguments (*See* Government Memorandum, p. 40) based on negotiation proposals are too speculative to warrant response. However, it is useful to note that if liability is imposed on the Government for the sums it financially derived from Louisiana's lands, the Agreement permits this to be collected from the impounded fund. *See* discussion in text *supra*, under Part III of the argument.

We note some obvious error in note 23, *e.g.* failure to correctly offset payments or credits made in the 1966 accounting. As noted *supra*, the data are not truly germane to the Exceptions. Therefore, we do not present corrective details now. We are confident mere mathematical oversight can be ironed out, as it has in the past, by the accountants applying the rulings of the Court to the accountings heretofore filed, after the decision of the Court sets those rules. Of course, all rights are reserved to differ with the Government on such detail at a correct time and place, and to also later show the true effect of the Court's actual rulings, after they are issued.

One substantive aspect is at the nexus of the two issues at bar and may become relevant for the Court to resolve to guide accounting work. If the Court rules in favor of the United States on the Zone 1 issue, and against Louisiana on Louisiana's Exception insofar as Louisiana's Exception seeks monetary recovery from the fund, it is conceivable the Court might yet rule that United States recovery against Louisiana is offset by the value of the Government's financial benefits. Correct theory actually calls for a cash recovery by Louisiana, but alternatively, Louisiana submits that the claim urged in Louisiana's Exceptions at least

cooperation can only be enhanced by giving force to the language and content of prior agreements between the parties and the June 16, 1975 Decree of this Court.

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bars by offset or equitable recoupment the claim of the Government Exception.

CONCLUSION

Louisiana respectfully urges that the Exception of the United States to the Report of the Special Master should be overruled, but that the reasoning of said Exception be employed to award the value of the federal use of Louisiana's oil lands money to the State as it is a sum causally derived from Louisiana's lands and resources.

Respectfully submitted,

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PROOF OF SERVICE

I, the Attorney General for the State of Louisiana, certify that copies of this reply brief have been properly served on the 14th day of December, 1979, by mailing copies, sufficient postage prepaid, to the Solicitor General and to the Attorney General of the United States, Department of Justice, Washington, D. C. 20530.

/s/ William J. Guste, Jr.
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December, 1979

APPENDIX 1

A Summary of Lease Description Language Utilized by Louisiana in Leases Granted in Zone 1 Showing that There Is No Basis to the Claims of the United States that Zone 1 Revenue Were Derived from Federal Areas.

State Lease 2590 (La. Ex. 1-LPI 73) contains language that is typical of the leases employed after the Tidelands controversy arose. It purported to lease

> All of the lands now or formerly constituting the beds and bottoms of all . . . water bodies of every nature and description *owned by the State of Louisiana* and not under lease as of June 21, 1954 (the date of bid advertisements) . . . [within a given engineering description shown on a plat]. [Emphasis added.]

State leases numbered 2592, 2716, 2986, 2868 and 2869 were granted prior to the Interim Agreement and were introduced under La. Exh. 1-LPI 74 through 76, 78 and 79. All of this group of leases employed this type of description.

Leases granted after the Interim Agreement of 1956 and before the 1962 lease form revision, were introduced under La. Exh. 1-LPI Nos. 80 through 91 (State Leases 3522, 3523, 3529, 3532 to 3536, 3624, 3626, 3772 and 3773), 129 (S.L. 1669), 132 (S.L. 1667), 133 (S.L. 1668).

This group of leases used the language

> All of that portion of [a certain offshore Block] . . . belonging to the State of Louisiana . . . not under

> lease . . . lying in Zone. . . . The entire block is described as [the precise metes and bounds descriptions of the Block are given, of which only the portion belonging to the State was being leased].

Leases granted by Louisiana after the 1962 form revision and before the 1966 revision, were introduced as La. Exh. 1-LPI Nos. 92 to 108 (State Leases 3839 to 3841, 3971, 3978, 4234, 4238, 4242, 4291, 4436, 4585, 4526, 4595, 4621, 4686, 4720, 4768) and La. Exh. I-LPI 123 (S.L. 4418). These used language like that in State Lease 3839 (La. Exh. 1-LPI 92), which was substantially the same as the pre-1962, post-Interim Agreement leases.

> All that portion of [a stated Block] . . . belonging to the State of Louisiana . . . not under lease [on the application date] . . . lying in Zone 1 as defined the October 12, 1956 agreement. . . .

As in the pre-1962 leases, acreages were estimated but these were only approximations. Typical language used was "estimated to comprise approximately 1,250 acres."

The leases after the 1966 lease form revision, introduced as La. Exh. 1-LPI Nos. 109 to 117 (State Leases 4932 to 4934, 4987, 5017, 5054, 5124, 5155, and 6312), all employed essentially the same type of descriptive language as the other post-1956 leases. *See, e.g.*, State Lease 4932, which reads:

> *Portion of Block 26* . . .
>
> That portion of Block 26 . . . belonging to the State of Louisiana and not under mineral lease . . . lying in Zone 1 as defined in the October 12, 1956 Agreement. . . .

This lease further identified the lands as "Portions of Block 26, Ship Shoal Area, Terrebonne Parish, Louisiana," limiting the leased area to those portions of the block *in* Terrebonne Parish. All of the other leases were so limited also.

This language contrasts with pre-June 5, 1950 lease description language (for which there is no liability for bonus or rental as per the Court's earlier decrees and the Outer Continental Shelf Lands Act). *See, e.g.*, State Lease 862 (La. Exh. 1-LPI 59) which refers to a block as being in "Vermilion Area" (not Parish) and refers to "Tract 1393 (Block 15), Gulf of Mexico, State of Louisiana." However, even this description was limited elsewhere to lands "located in Vermilion Parish, Louisiana."

The specific description though, did not contain the "owned by," "belonging to Louisiana," "not under lease," "in Zone 1," clauses of the post-1956 leases.

We found only two leases, using the October, 1948 revised lease form, granted after June 5, 1950 which were not restricted by express clauses to areas within the tract "belonging to" or "owned by" Louisiana. These are State Leases 2550 and 2554 (La. Exh. 1-LPI 71 and 72).

These are the *only* two leases the United States can point to which involved an actual leasing of areas won by the United States. They are the *only* two which involve bonus or rental revenue, which, in the language of the decree, were "derived by the State of Louisiana since June 5, 1950 by . . . leasing . . . from or on account of any

of the lands, minerals or resources described in paragraph 1" of the Decree.

Therefore, even if the Court should overrule the finding of the Special Master that Louisiana is entitled to retain all Zone 1 revenue, only the pro rata portion of the bonus or rental of these two leases should be taken into account.

It is noteworthy also that the bonus and rental payments made were not on an acreage basis, but were on a lump sum basis. *See, e.g.*, State lease 2590 (La. Exh. 1-LPI 73) providing for a bonus of $1,673,000.00 and a rental of $836,500.00, not a price or rental per acre. Therefore, it cannot be urged that inclusion of federal areas in the tract descriptions enhanced the bonus and rental payment computations. Even if that were the case, however, that which Louisiana leased was only what it owned, not what the United States owned, and therefore no part of the bonus or rentals from any except the two exceptional leases are even arguably derived from or on account of the federal areas in Zone 1.

Before the Special Master, the Government did not carry its burden of showing that the areas were *not* part of Louisiana at the time the leases were granted.

The Master considered the holdings of this Court that for various times and periods Louisiana had title to certain areas, but not on a permanent basis, due to shoreline and related cartographic change. The United States did not put on engineering or other technical evidence to

support its burden of proof that at the time particular leases were granted, the tracts described were owned by the United States.

The detailed provisions discussed above may be summarized as follows. With but two exceptions, all of the many dozens of leases for which the United States claims it is entitled to lease revenues, were either (a) granted before June 5, 1950 and thus there is no liability for bonus and rental or (b) very carefully only purported to lease water bottoms in Zone 1 *belonging to or owned by* Louisiana, within a described tract. The leases mentioned under (b) above were not leases of the whole tracts; they were explicitly only those *portions* of geographic areas (and at that only in Zone 1) which were *owned* or *belonging to* Louisiana. Payments received by way of bonus or rental were for or on account of (in the language of the Decree) only those portions owned by or belonging to Louisiana, as the lease descriptions irrefutably prove. The ultimate basis of the United States' Exception is that the engineering, plat or metes and bounds description of the general area (in which only the portion owned by Louisiana was being leased) included area won by the United States. Such a position is only excusable as resulting from a lack of technical expertise or familiarity with oil and gas contract terminology. The lack of oil and gas contract experience was admitted by Mr. Swarth, the long-time head of the legal staff that developed Tidelands claims:

Q. You are really not an oil and gas lawyer?

A. Oh, no.

* * *

I had nothing to do with oil and gas law.

* * *

I am not an expert on oil and gas terminology. (Dep. Tr. 71 and 72)

Yet, this testimony was offered as somehow persuasive on oil and gas contract meanings.

APPENDIX 2

AGREEMENT BETWEEN UNITED STATES OF AMERICA AND STATE OF LOUISIANA PURSUANT TO SECTION 7 OF THE OUTER CONTINENTAL SHELF LANDS ACT AND ACT 38 OF THE LOUISIANA LEGISLATURE OF 1956[1]

WHEREAS, there is a controversy between the United States of America, hereinafter referred to as the United States, and the State of Louisiana, hereinafter referred to as the State, as to whether certain submerged lands in the Gulf of Mexico are owned by the State of Louisiana or whether such submerged lands are owned by the United States; and

WHEREAS, on June 11, 1956, the Supreme Court of the United States issued an order in the case entitled *United States of America v. State of Louisiana*, Original No. 15, October Term 1955, which provided among other things as follows:

> "It is further ordered that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed tidelands area pending further order of this court unless by agreement of the parties filed here."

and,

WHEREAS, Section 7 of the Outer Continental Shelf

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[1] Footnotes are used in this Appendix to indicate discrepancies between the Government's quotation of the Interim Agreement (in the Appendix to the "Memorandum in Support of Exception" filed by the United States, hereinafter referred to as Government Appendix) and the actual text of that agreement, including the omission of the 1964 amendment to it, *see* fn. 5 *infra* and Appendix 3.

Lands Act of August 7, 1953 (67 Stat. 462), hereinafter referred to as the Act, authorizes the Secretary of the Interior, with the concurrence of the Attorney General of the United States, to negotiate and enter into agreements with the States respecting operations under existing mineral leases and payment and impounding of rents, royalties and other sums payable thereunder, and respecting the issuance or non-issuance of new mineral leases pending the settlement or adjudication of the controversy; and

WHEREAS, the State of Louisiana, in Act 38 of the Louisiana Legislature of 1956, in recognition of the existence of the aforesaid controversy and of the said action of the Supreme Court of the United States, confers authority on the State Mineral Board, with the occurrence of the Attorney General of Louisiana, to negotiate and enter into agreements or stipulations for and on behalf of the State with the United States, respecting operations under any present or future mineral leases on the area in controversy, or the deposit in escrow or impounding of bonuses, rents, royalties and other sums payable thereunder pending the settlement or adjudication of the controversy; said act also providing for the ratification by the State of Louisiana of any mineral lease covered by any agreement entered into pursuant to its provisions, subject to compliance with its requirements; and

WHEREAS, the parties hereto agree that it is to the best interest of the United States and the State of Louisiana that the drilling of new wells be commenced and that, in certain instances, provision for leasing be made in the disputed area; and

WHEREAS, the United States of America and the State of Louisiana desire to provide for the impoundment of certain bonuses, rentals, royalties and other sums heretofore or hereafter payable under mineral leases in the disputed area, pending the final settlement or adjudication of the said controversy, and thereafter for the validation or recognition of outstanding leases issued by either party,

NOW, THEREFORE, the United States of America and the State of Louisiana, by and through the Secretary of the Interior and the State Mineral Board, respectively, and with the concurrence of the Attorneys General of the United States and of the State of Louisiana, stipulate and agree as follows:

1.

No definition, agreement or provision hereof shall be construed to waive or prejudice in any way any right or claim which either party now has or may hereafter be determined to have in and to any or all of the area referred to herein as the area in dispute, nor shall any provision hereof be the basis for questioning, prejudicing or waiving in any manner any right, interest, claim, or demand whatsoever of either party now pending in the proceedings above referred to, or otherwise; and as to the State of Louisiana, nothing herein contained shall be construed in any manner as affecting the claim of the State of Louisiana to its historic boundaries as redefined in Act 33 of the Louisiana Legislature of 1954, or as otherwise fixed or defined, or the claim of the State of Louisiana to property and mineral rights within its historic boundaries.

2.

The submerged lands in the Gulf of Mexico are divided for the purposes hereof into four zones as shown on the plat annexed hereto as Exhibit "A", which reflects as a base line the so-called "Chapman-Line." No inference or conclusion of fact or law from the said use of the so-called "Chapman-Line" or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto or of any third party. It is recognized that the so-called "Chapman-Line" has not been actually surveyed and that while the limits of each zone as reflected on the annexed[2] Exhibit "A" shall be binding upon the parties for the purposes hereof, said specific limits remain to be finally fixed and determined either by agreement of the parties or otherwise. The aforesaid zones are as follows:

(a) Zone No. 1 comprises the area lying seaward of and within three (3) geographical miles of the so-called "Chapman-Line."

(b) Zone No. 2 comprises the area which is bounded landward by the seaward boundary of Zone No. 1 and which is bounded seaward by a line three (3) Marine Leagues from the so-called "Chapman-Line."

(c) Zone No. 3 comprises the area bounded landward by the seaward boundary of Zone No. 2 and bounded seaward by the seaward boundary line of the State of Louisiana as fixed and redefined by Act 33 of the Louisiana Legislature of 1954.

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[2] "announced" in Government Appendix.

(d) Zone No. 4 comprises all that portion of the Continental Shelf lying seaward from the seaward line of Zone No. 3.

3.

Notwithstanding the existence of a dispute or controversy as to any other area, the disputed area as hereinafter referred to, sometimes referred to as the disputed tidelands area, or the area affected by the aforesaid controversy, is defined, for the purposes of this agreement, to be the area comprising Zones 2 and 3, as above defined and shown on the Exhibit "A".

4.

As to any leases heretofore granted by either party, this agreement shall be applicable only to any oil, gas or other mineral lease which was on June 11, 1956, and is on the effective date hereof in full force and effect, either by virtue of its terms or as the result of a suspension or extension as hereinafter referred to in Paragraph 11 (b) (1) and (3), either as to the United States, the State, or both, as to oil, gas or other minerals, insofar as any such lease relates to lands within the disputed area. This agreement shall also be applicable to any lease as to which, on the effective date hereof, all requirements for the validation thereof under Section 6 of the Act have been complied with, but which has not yet been validated under said Section 6.

5.

The United States and the State of Louisiana hereby consent to the drilling of new wells in the disputed area

on any lease or part thereof to which this agreement is applicable, by the lessee or approved operator of such leases, provided that the lessee shall have complied with the following requirements:

(a) Such lessee shall have executed the waiver and consent agreement annexed hereto as Exhibit "B", in which it shall waive (under certain conditions set forth therein) as to such lease or part thereof, any claim based on ownership of the leased area by the State of Louisiana to a refund of any sums impounded by the United States under Paragraph 7 hereof, which it has or may have during the life of this agreement against the United States under Section 10 of the Act, or under any agreement entered into under Section 7 of the Act, and in which such lessee consents to the provisions of this agreement with respect to the impoundment and release of impounded funds.

(b) Such lessee shall also have entered into a separate agreement with the State of Louisiana on one of the six forms annexed hereto as Exhibits "C", "D", "E", "F", "G" and "H". Exhibit "C" is applicable to any producing lease or lease containing shut-in wells granted originally by the State and validated under Section 6 of the Act. Exhibit "D" is applicable to any of the same type of producing and shut-in well leases granted by the United States under Section 8 of the Act. Exhibit "E" is applicable to any non-productive lease granted originally by the State of Louisiana and validated under Section 6 of the Act. Exhibit "F" is applicable to any non-productive lease granted originally by the United States under Section 8 of the Act. Exhibit "G" is applicable to any of the leases granted by the State since May 22, 1953. Exhibit "H" is applicable

to any lease granted originally by the State of Louisiana under which payments have been made both to the United States and the State of Louisiana, so as to maintain the lease in effect as to both parties. If there is a need for variation to meet a factual situation relating to any lease which, in the opinion of both the State of Louisiana and the lessee, requires the insertion of special provisions in the form of agreement otherwise applicable to said lease, such special provisions may be inserted in said agreement by mutual consent of the State and the lessee; provided that said agreement otherwise incorporates the same basic requirements of the lessee. As to the leases affected by the two unitization agreements specifically listed in paragraph 12 (b) and as to the leases affected by the agreements referred to in paragraph 11 (b) (3), the form of agreement otherwise applicable to such leases shall be amended so as to refer specifically to such agreement and give recognition thereto.

The waiver and consent agreement and executed copies of the separate agreement with the State of Louisiana shall be filed in duplicate with the Unted States Oil and Gas Supervisor, United States Geological Survey, in New Orleans, Louisiana, and in duplicate with the Secretary of the State Mineral Board, State Capitol, Baton Rouge, Louisiana; and upon such filing, the consent to drill herein granted shall, without further action by any of the parties be effective. However, the consent to the drilling of new wells contained in this Paragraph 5 shall not relieve any lessee of the obligation to comply with all regulatory provisions relating to drilling and production.

The drilling of any wells on a unitized area will not

be permitted until the waiver and consent agreement and a separate agreement with the State, as hereinabove provided for, shall have been executed by the lessee for each lease committed to that unit.

6.

Notwithstanding any adverse claims by the other party hereto, the State of Louisiana as to any area in Zone No. 1, and the United States as to any area in Zone No. 4, shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party.

7.

(a) Subject to the exclusions of subparagraph (d) hereof, the United States agrees to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties and other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3, being the disputed area, if, as and when each such lease is made subject to the provisions of this agreement by the lessee thereof complying with the provisions of Paragraph 5 hereof.

(b) The State of Louisiana, since May 22, 1953, has granted certain mineral leases which affect submerged lands located in the disputed area. The parties take cognizance that, under the laws of the State of Louisiana, the State of Louisiana cannot impound sums heretofore paid

to it with respect to such leases. Accordingly, in order that any lessee desirous of obtaining consent for the drilling of a well on any such lease may satisfy the requirement of the United States that such payments be impounded, the State of Louisiana agrees, with respect to any such lease, and as provided in Exhibit G hereof, (1) to require of any lessee seeking a drilling permit to drill any portion of the leased premises lying within the disputed area to deposit in a separate fund for impoundment in the Treasury of the State of Louisiana a sum equal to all bonuses, rentals, royalties and other payments applicable to the disputed area theretofore paid to the State by the lessee, and to hold the amount so deposited as an impounded fund in its treasury, subject to the provisions hereof, and (2) to impound all payments hereafter received by it from the lessees of any of the said leases issued by the State in the disputed area since May 22, 1953, which are made subject to this agreement.

(c) As to any lease granted originally by the State of Louisiana under which payments have been made both to the United States and the State of Louisiana, so as to maintain the lease in effect as to both parties, it is agreed that (a) as to any such lease which is not now producing oil, gas or other minerals, lessee shall be required to continue, until further agreement of the parties, or until the final settlement or adjudication of the controversy, to make such dual rental payments, including payments based on shut-in wells; but in the event production of minerals is commenced, lessee shall deposit single royalty payments based upon such production for impoundment as provided for in sub-paragraph (e) hereof; (b) with respect to any well or wells now producing minerals from any such

lease with respect to which royalty has been paid both to the State of Louisiana and to the United States, the lessee shall be required to continue, until further agreement of the parties, or until final settlement or adjudication of the controversy, to make such dual royalty payments under the terms of the applicable leases, subject to the provisions of any applicable agreement heretofore entered into between such lessee and the State of Louisiana, or between such lessee and the United States. No such royalty paid to the State of Louisiana on oil, gas and other minerals produced from any such well shall be subject to impoundment as herein provided for. However, in the event production is obtained from any additional well or wells which are not now producing minerals, single royalty payments based upon the production from any such well or wells shall be deposited for impoundment as provided for in sub-paragraph (e) hereof.

(d) There shall be excluded from the obligations of the parties in this paragraph 7 to impound separately (1) the dual rental payments, including payments based on shut-in wells, and dual royalty payments referred to in sub-paragraph (c) hereof, made under any lease, including such dual payments made under any agreement entered into under Section 7 of the Act, and (2) any rentals paid to the United States for that portion of the submerged lands affected by any lease granted originally by and valid as to the State of Louisiana extending into the disputed area when production is being obtained from that portion of the leased premises lying in Zone No. 1.

(e) All sums subject to impoundment which are pay-

able hereafter under the terms of the leases granted by the State of Louisiana, as referred to in sub-paragraph (b) hereof, shall be paid by the lessee to the State of Louisiana for impoundment as hereinabove provided. All sums subject to impoundment which may hereafter be payable by any lessee under the terms of any other lease made subject to the provisions hereof shall be paid by the lessee to the United States for impoundment as herein provided for.

Such payments to the State of Louisiana shall be made to the Register, State Land Office, or the official or agency then designated by Louisiana law to receive such payments, and deposited in a separate fund for impoundment in the Treasury of the State of Louisiana.

Such payments to the United States shall be made to the Oil and Gas Supervisor, United States Geological Survey, New Orleans, Louisiana, or the official or agency then designated by the law of the United States to receive such payments, for impoundment in a separate fund in the Treasury of the United States.

(f) In the event that only a part of a lease is within the disputed area, the sums to be impounded under this paragraph 7 shall be determined on a pro-rata basis as hereinafter provided for in Paragraph 10.

(g) The United States and the State of Louisiana agree that all such payments made pursuant to sub-paragraph (e) above, if otherwise made in accordance with the provisions of each such lease and this agreement, shall, subject to the provisions of Paragraph 11 (a) hereof, be considered as payments in compliance with the lease affected.

8.

Each of the parties,[3] promptly after the effective date hereof, and in any event within 90 days from such effective date, shall furnish to the other party a statement of all sums which are subject to impoundment by each party under the terms hereof. Such statement shall be made separately with respect to each lease or portion thereof within the disputed area and shall reflect the amounts theretofore received and the nature and source of the funds so received. Thereafter the parties shall cooperate in making available to each other on a monthly basis a statement with respect to each such lease, so that each party shall have a current record of the amounts received with respect to each such lease and the nature and source thereof.

9.

Except as to claims under Section 10 of the Act with respect to sums which would not be due to the State of Louisiana even if the question of ownership of the leased land is determined in the State's favor, the impounded funds provided for herein shall be held intact in a separate account for each lease or portion thereof affected, by each party until title to the area affected is determined. Whereupon, except as otherwise herein provided:

(a) Any funds derived from an area finally determined to be the property of the United States shall be taken from the separate and impounded fund in the Treasury of Louisiana provided for herein and paid to and received in the Treasury of the United States as provided by law.

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[3] "portions" in Government Appendix.

(b) Any funds derived from an area finally determined to be owned by the State of Louisiana (except the funds referred to in subparagraph (c) hereof) shall be taken from the separate and impounded fund in the Treasury of the United States provided for herein, paid to the Register, State Land Office, State of Louisiana, or the official or agency then designated by Louisiana law to receive such payments, and shall thereafter be received in the Treasury of the State of Louisiana as provided by law.

If, with respect to any lease, the lessee shall have paid the State of Louisiana all or any part of the amount of the impounded fund, prior to the payment of such impounded fund to the State of Louisiana by the United States, the amount of such payment so made by the lessee shall not be paid to the State, but shall be subject to the provisions of subparagraph (d) hereof.

(c) Any funds representing additional royalty paid to the United States under Section 6 (a) (9) of the Act which are impounded pursuant to Paragraph 7 (a) hereof, shall, on determination that such funds are derived from an area determined to be owned by the State of Louisiana, be taken from the separate and impounded fund in the Treasury of the United States provided for herein and paid to the Collector of Revenue of the State of Louisiana, or the official or agency then designated by Louisiana law to receive such payments, and shall be credited by the State only against taxes which may be due and payable and not theretofore paid to the State under the terms of the agreement between the State and the lessee of such lease or leases from which such funds were derived; and any of such funds in excess of the credit required to make the

State whole in respect to such taxes shall be released by the State to such lessee or lessees.

(d) In those[4] cases (1) where the lessees have not complied with Paragraph 5 of this agrement, or (2) where dual payments have been made both to the United States and the State of Louisiana, including such dual payments made under any agreement entered into under Section 7 of the Act, or (3) where the lessee shall have made payments to the State of Louisiana under any lease of all or any part of the impounded funds prior to the time that the impounded funds are paid by the United States to the State of Louisiana, or (4) where rentals have been paid to the United States during the period that production is being obtained on that part of the same lease granted by and valid as to the State of Louisiana, and lying in Zone No. 1, or (5) finally as to any lease or part thereof determined to be owned by the United States, where sums have been paid for impoundment in excess of the amount that lessee was lawfully required to pay under such lease, refunds, if any, from the United States shall be made to the lessees pursuant to applicable law.

(e) Payments of impounded funds hereunder shall be made in full within seventy-five (75) days after the date of the applicable determination, unless by agreement of the parties a later date is specified.

(f) The provisions of this paragraph shall apply separately to each lease or that portion thereof in the disputed area.

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[4] "these" in Government Appendix.

10.

In the event only a portion of the area affected by any lease lies within the disputed area, then until the final settlement or adjudication of the controversy, all sums which are to be impounded by any party under the terms hereof shall be pro-rated on an acreage basis as to bonuses and rentals; and as to royalties, the amount shall be computed by attributing to the area in dispute royalties from each well bottomed under the area in dispute. (If, however, in connection with royalty payments, any well or wells are bottomed under a unit theretofore validly established which includes submerged lands lying within the area of dispute, the royalty from such well or wells shall be allocated to each lease or portion thereof lying within the area of dispute, in the proportion that the number of acres covered by such lease and participating in the production from any such well or wells, in accordance with the terms of the unit agreement, bears to the total number of acres so participating in such production.) [5]

However, as to the unit for oil and gas dated October 27, 1954, approved December 22, 1954, of which Continental Oil Company is the operator, comprising 51,579.78 acres, including Blocks 38 through 41, 46 through 49, 51, 52, and the west half of 53 in the Grand Isle area, and the unit for oil and gas dated November 21, 1955, approved January 16, 1956, of which Continental Oil Company is the operator, comprising 27,997.605 acres, including

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[5] The language enclosed in parentheses was amended by agreement of the parties on December 11, 1964. The full text of the amendment is set out in Appendix 3, *infra*, as well as at p. 42 of this brief, *supra*.

Blocks 42, 43, the north half of 44, the south half of 32, 69, 70, the south half of 67, and the south half of 68, in the West Delta-Grand Isle area, until such time as the United States and the State shall agree on another method of allocation, the allocation provisions of the two said unit agreements shall be disregarded, and there shall be attributed to each lease or portion thereof in the disputed area the royalties from the well or wells bottomed under such lease or portion thereof.

In the event of a final determination that either party hereto owns only a portion of the area affected by any lease or leases, the impounded funds shall be pro-rated on the same basis as just hereinabove provided for, and payments shall be made accordingly.

11.

(a) Upon the final settlement or adjudication of the aforesaid controversy, as to any area affected by a lease or portion thereof to which this agreement is applicable, the successful party, upon receipt of the impounded funds, shall validate and give recognition to such lease or portion thereof, and shall grant to the lessee all of the rights authorized or provided for by the laws of the successful party. It is provided, however, that the ratification and validation of any lease by the State of Louisiana shall be subject to the full compliance by the lessee under said lease with Act 38 of the Louisiana Legislature of 1956, and shall be in accordance with and subject to compliance with the terms of the separate agreement to be made by such lessee with the State of Louisiana as herein provided for.

(b) Nothing herein contained shall obligate the

United States or the State to recognize or give effect to any conventional agreement executed, or any order, determination or regulation issued by the other subsequent to June 11, 1956, amending, modifying or otherwise changing any lease subject to the provisions of this agreement, except that the successful party in the controversy shall recognize and give effect to the following, even though subsequent to June 11, 1956:

(1) An agreement, order or determination recognizing that the running of the period during which any lease may be maintained in effect without drilling or producing operations or without payment of shut-in rental or royalty on the basis of a well capable of producing oil, gas or other minerals, insofar as it relates to land affected by the aforesaid controversy, has been and shall be suspended during the period or periods of time that the right to drill has ben enjoined by order of court;

(2) The pooling and unitization agreements as provided for and as described in paragraph 12 (b) hereof;

(3) The suspension or extension of the necessity for producing from oil or gas wells, and the recognition of the continuance of the leases affected during such suspension or extension, provided such suspension or extension is on any one of the following bases; (a) An extension of the period formerly provided within which to make payments of shut-in gas rental or royalty; (b) The shutting[6] in of a well when necessary or desirable for the prevention of waste, or as a matter of operational safety, such as during the drilling of another well from the same platform; (c)

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[6] "abutting" in Government Appendix.

The shutting[7] in of a well for such period or periods as may be reasonably necessary to permit installation of producing and transporting facilities; (d) Under Section 12 of the Act.

Neither party shall, without the consent of the other, enter into any agreement reducing rentals or royalties payable under any lease made subject to the terms hereof.

(c) Any lessee shall have the right to elect not to maintain in force and effect any lease brought under the terms hereof, but any such election or any failure of a lessee to maintain a lease in effect shall not relieve that lessee of the obligation to pay to the State of Louisiana or to the United States, with respect to such lease, all bonuses, rentals, royalties and other considerations (and with respect to the State of Louisiana all licenses, taxes and fees) which have become due prior to the termination or forfeiture of said lease. Also, this agreement as between the United States and the State of Louisiana, shall continue in effect as to the payments made with respect to such lease.

(d) The provisions of this Paragraph 11 shall apply separately to each lease or that portion thereof in the disputed area.

12.

(a) The parties hereto agree to consult and cooperate with respect to the approval of pooling or drilling agree-

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[7] "abutting" in Government Appendix.

ments relating to leases lying partly within and partly without the disputed area.

(b)[8] It is agreed that, for the purpose of ratification and validation of each separate lease or portion thereof included therein, as provided for in Paragraph 11 (a) above, any unit validly established by agreement of either party prior to June 11, 1956, shall be given effect in accordance with its terms and the law, regulation or order under which it was established; provided that neither this provision nor any other provision of this agreement, or of the unit agreement, shall limit the right of the party finally determined to own the area or portion thereof affected by such unit, if not the party by whom or with whose consent such unit was established, from taking, subsequent to such final determination, such action with respect to any such unit as may be authorized by and consistent with its then laws or policies. Any lessee affected by such action shall be given a reasonable time within which to comply with the then laws or policies and to safeguard the terms of its lease. Notwithstanding their establishment subsequent to June 11, 1956, the provisions of this paragraph 12 (b) shall also be applicable to the following described unitized areas and unit agreements in the same manner as though they had been established prior to June 11, 1956, same being all such which were approved subsequent to said date and prior to October 9, 1956:[9]

1. The unit for oil and gas dated December 9, 1955, and approved June 29, 1956, of which Magnolia Petroleum

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[8] "(d)" in Government Appendix.

[9] "1965" in Government Appendix.

Company is the operator, comprising 17,250 acres in the Ship Shoal Area, lying in Block 63, west half of 64, west half of 71, 72, east half of 73, and north half of 87.

2. The oil and gas unit dated May 25, 1956, which was approved on June 28, 1956, of which Kerr-McGee Oil Industries, Inc. is the operator, comprising 30,000 acres in the Ship Shoal Area lying in Blocks 27, 28, 29, 34, 35 and 36.

13.

No new leases shall be granted by either party in that part of the disputed area lying in Zone No. 2, except that when the Secretary of the Interior and the State Mineral Board of Louisiana shall jointly determine new leases are necessary to prevent drainage of unleased lands, the Secretary of the Interior may grant such new leases which shall be subject to the terms of this agreement. Otherwise, the injunction against new leasing shall continue to be effective as to that area.

Beginning one year from the effective date hereof, the Secretary of the Interior, or his delegate, may grant new mineral leases in Zone No. 3, being the remainder of the disputed area.

All leasing pursuant to this Paragraph 13 shall be done by the Department of the Interior in accordance with and subject to its then regulations and practices under the Act, including the determination of when lease sales shall be held and what land shall be offered, the method of advertising, the date and time of the opening of bids,

and the awarding, execution and form of leases, *Provided* that the minimum royalty, bonus and rental for any such lease shall not be less than the minimums provided in the proposed letting of May 15, 1956, and the maximum acreage in any lease and the term thereof shall be as provided for in said proposed letting; *Provided, further*, that there shall be a joint committee of six, three members of which shall be designated or appointed by the Secretary of the Interior or his delegate, and three members of which shall be designated or appointed by the State Mineral Board of the State of Louisiana, whose duties and functions shall relate solely to a consideration of adequacy of the bids. The Director of the Bureau of Land Management shall promptly furnish to this committee full information as to all bids received, designating specifically those[10] which he proposes to accept or reject. The committee shall accept the decision of the Director with respect to the bid or bids on any block, tract or portion thereof unless four members thereof shall cast an opposing vote in which case the decision of the committee shall prevail and the Director shall act in accordance with such recommendation. The committee shall be allowed no more than 10 days within which to consider and act on the information submitted to it.

All sums payable under the terms of any lease granted pursuant to this Paragraph 13 shall, notwithstanding any other provision of this agreement, be paid to the United States for impoundment and release as provided for in Paragraphs 7 and 9 above, and any such lease shall be subject to all of the terms and provisions of this agreement,

[10] "these" in Government Appendix.

including, but not limited to the consent to drill and the validation provisions hereof.

14.

Any sums required to be impounded by either party hereto, or to be paid over or released to the other party by any party hereto, shall be impounded, paid or released without reference to, limitation by, or offset[11] against any claim against or liability or obligation of the other party, but nothing herein contained shall limit such right as either party may have to assert separately any other claim which it may have against the other party, or any third party.

15.[12]

This stipulation and agreement shall terminate as to any area, upon the final settlement or determination of the aforesaid controversy with respect to such area; and thereafter the successful party shall have exclusive jurisdiction and control over the area so determined to be owned by it to the extent fixed by the decision in the final adjudication. In the event of the final settlement or determination of the controversy, with respect to a part or parts of the disputed area, leaving another part or other parts still in dispute, this agreement shall be deemed to continue to apply to all areas still in dispute; and if the area still in dispute divides a lease now lying wholly within the disputed area, or divides a portion of a lease lying within the disputed area, this agreement shall continue to

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[11] "effect" in Government Appendix.

[12] Paragraph number omitted in Government Appendix.

apply to that portion of such divided lease lying within the area still in dispute. It is provided, however, that notwithstanding the termination of this stipulation as to any area, the parties shall nevertheless comply with all of the provisions hereof relating to the payment or release of impounded funds and the validation or ratification of the lease or leases affected by such termination.

Upon the final settlement or adjudication of the controversy as to all of the submerged lands within the disputed area, this stipulation shall finally terminate, subject only to the release of payments and the validation and ratification requirements hereof.

Annexed hereto as Exhibits I and II, respectively, are certified copies of Act 38 of the Louisiana Legislature of 1956 and Act 33 of the Louisiana Legislature of 1954, hereinabove referred to.

THUS MADE AND EXECUTED effective this 12th day of October, 1956.

UNITED STATES OF AMERICA

By (Sgd) Fred A. Seaton
Secretary of the Interior

Concurred in by:

(Sgd) Herbert Brownell, Jr.
Attorney General of the
United States

STATE MINERAL BOARD ON
BEHALF OF THE STATE OF
LOUISIANA

By (Sgd) William G. Helis, Jr.
Chairman

Concurred in by:

(Sgd) Jack P. F. Gremillion
Attorney General of the
State of Louisiana

APPENDIX 3

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF LOUISIANA AMENDING ARTICLE 10 OF THEIR AGREEMENT OF OCTOBER 12, 1956, PURSUANT TO SECTION 7 OF THE OUTER CONTINENTAL SHELF LANDS ACT AND ACT 311 OF THE LOUISIANA LEGISLATURE OF 1964

WHEREAS, on October 12, 1956, the United States of America and the State of Louisiana entered into an agreement regarding the operation and management of submerged lands off the coast of Louisiana pending determination of the ownership of such submerged lands; and

WHEREAS, the second sentence of Article 10 of that agreement provides:

> If, however, in connection with royalty payments, any well or wells are bottomed under a unit theretofore validly established which includes submerged lands lying within the area of dispute, the royalty from such well or wells shall be allocated to each lease or portion thereof lying within the area of dispute, in the proportion that the number of acres covered by such leases and participating in the production from any such well or wells, in accordance with the terms of the unit agreement, bears to the total number of acres so participating in such production.

and

WHEREAS, experience has shown that in some cir-

cumstances it is preferable to allocate unit royalties on some basis other than that of acreage as required by the foregoing provision,

NOW, THEREFORE, the United States of America, acting by and through the Secretary of the Interior with the concurrence of the Attorney General, pursuant to Section 7 of the Outer Continental Shelf Lands Act, and the State of Louisiana, acting by and through the State Mineral Board with the concurrence and approval of the Attorney General pursuant to Act 311 of the Louisiana Legislature of 1964, agree that the second sentence of Article 10 of the Agreement of October 12, 1956, is hereby amended to read as follows:

> If, however, in connection with royalty payments, any well or wells are bottomed within a unit validly established which includes submerged lands lying within the area of dispute, the royalty for minerals produced from such well or wells after establishment of the unit shall be allocated to each lease or portion thereof lying within the area of dispute in such proportion and in such manner as may be agreed to by the State Mineral Board and the Secretary of the Interior, or his delegate.

THUS MADE AND EXECUTED effective this 11th day of December, 1964. [There followed the signatures of the Secretary of the Interior and other federal and state officials.]

Supreme Court, U. S.
FILED
DEC 14 1979
MICHAEL RODAK, JR., CLERK

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

REPLY MEMORANDUM FOR THE UNITED STATES

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Solicitor General

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STATEMENT

The present memorandum is confined to what the Special Master has labelled the "First Issue": whether the United States owes interest on, or a sum representing the value of the use of, the funds for some years "impounded" in the federal Treasury which were ultimately determined to belong to the State of Louisiana. Except for some split-lease revenues, the United States has long since paid over to the State its share of the impounded funds, but Louisiana objected that the payments included no interest or like increment. The Master rejected that objection (Report 4-15), and the State has now excepted. Although Louisiana has filed four exceptions, they all challenge the same ultimate ruling.

The question arises because, pursuant to a so-called Interim Agreement between the parties dated October 12, 1956, the United States collected and retained payments

from mineral lessees in respect of disputed offshore areas, some of which were eventually adjudicated to Louisiana. Specifically, the Agreement provided that the United States would "impound [such receipts] in a separate fund in the Treasury" (para. 7(a)),[1] where they would be "held intact, in a separate account * * * until title to the area affected is determined" (para. 9), at which time, "[a]ny funds derived from an area finally determined to be owned by the State of Louisiana * * * shall be taken from the separate and impounded fund in the Treasury" and paid over to the appropriate State officer (para. 9(b)). In what it deemed compliance with these provisions, the United States established a separate account to which was credited every receipt from the disputed area—albeit the lessees' checks were cashed and the cash was commingled with the Treasury's general funds and used in ordinary governmental operations. And, whenever affected areas were adjudicated to Louisiana, the United States paid over to the State the full amount derived from such areas, but without interest or other increment.

For at least a decade after the execution of the Interim Agreement of 1956, Louisiana was apparently content with this understanding of the Agreement. Thus, in 1965 the parties agreed to a partial judgment which involved paying over some $34 million of impounded funds to the State. See 382 U.S. 288, 293. Yet, that payment was made without interest or any request for interest.[2] Two

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[1]The full text of the Interim Agreement is reproduced as an appendix to our Memorandum in Support of Exception. The provisions cited here appear at pages 8a and 13a.

[2]In 1975, as part of its objections to our recent accounting, Louisiana, for the first time, demanded interest or a like increment in respect of the $34 million disbursed in 1966.

years later, it is true, the Louisiana Legislature formally "requested" that henceforth impounded funds be invested so as to earn interest. But the State then asserted neither an existing legal obligation on the part of the United States to effect such investments nor a present right in the State to receive any increment unless the United States actually invested the funds. And the matter was not pursued when the United States declined the proposal. The first claim to interest or "compensation" as of right came in 1975.

Before the Special Master (as now before the Court) Louisiana seemed to be asserting, without complete consistency, that the United States had breached the Interim Agreement in two respects: (1) by failing to *invest* the impounded monies, so as to increase the fund for the benefit of both parties when it came to be divided; and (2) by *freely using* the cash receipts, thereby reducing its borrowing needs and unjustly enriching itself. The Master rejected both arguments.

The Report began by noting that "[i]ndisputably the Interim Agreement does not specifically provide for the payment of interest upon any part of the funds impounded pursuant to it" (Report 5). Then, addressing the suggestion of an implied undertaking to invest the funds, the Master reviewed the testimony of the negotiators and concluded that "the evidence in this case clearly negatives any such understanding upon the part of the parties to the Interim Agreement" (*id.* at 7-8). To the contention that the United States should be made to disgorge its "unjust enrichment" from using Louisiana's share of the impounded fund, the Master answered that the handling of the receipts by the Treasury was—as Louisiana had accepted for two decades—in no way

inconsistent with the Interim Agreement, (Report 13), that the requirement to keep the funds "intact" "[o]bviously * * * does not mean that the actual dollars received from oil and gas leases in the disputed area should retain their identity" (*id.* at 14), and that the Agreement was fully satisfied by the maintenance of the special deposit account, which accurately recorded the increasing potential liability of the United States and against which "[n]o other liabilities have ever been charged" (*id.* at 14-15). The Special Master concluded that "the United States has no further obligations beyond those it has performed" (*id.* at 15).

Louisiana has now renewed its arguments before the Court.

ARGUMENT

A. Introduction and Summary

On the "interest" issue, we primarily rely on the Special Master's Report rejecting Louisiana's claim. Because that Report fully answers most of the State's arguments, we confine ourselves to an unusually brief submission.

Although Louisiana has advanced a number of alternative contentions, there is, at the end of the day, only one question: Was the United States required to add interest when it distributed to the State its share of the mineral revenues that had been "impounded" in the federal Treasury? We put the matter this way because, when all is said and done, the United States was acting in the role of a bank holding its depositor's money and the nub of the controversy is whether the account representing those deposits should have been a "savings account" bearing interest, instead of an ordinary

"checking account." Obviously, in either case, the Treasury, like the bank, would enjoy unrestricted use of the actual cash. And, since it is common ground that any "investment" would have been in Treasury securities, it is irrelevant whether embossed certificates were placed in the account or whether interest was simply "credited" to the account on the same terms.

Our answer is that the Interim Agreement of 1956 did not provide, expressly or impliedly, for the establishment of an interest bearing account. This was well understood at the time the Agreement was executed, and the actual practice was known and acquiesced in by Louisiana for two decades thereafter. Nor could an obligation to invest the funds or pay interest arise by operation of law, for, except as the Constitution, an Act of Congress, or a valid agreement expressly provides for it, interest is not collectible from the United States.

B. The Handling of the Money

As we have noted, the Interim Agreement of 1956 provided that the payments made to the United States on federal leases within the disputed area would be "impound[ed] in a separate fund in the Treasury," there to be "held intact, in a separate account," until title to the affected tract was determined. At times, Louisiana appears to suggest that these words required the United States to preserve the checks received from lessees, or the cash proceeds, in the equivalent of an office safe. But that is, of course, wholly unreal. Everyone obviously understood that the Treasury does not segregate cash: it all goes to the general fund, where it is used to pay current governmental expenses—just as a bank commingles and freely uses its depositors' money. And that would be true whether the Treasury "bought" an interest-

bearing security in the name of the impounded fund or simply placed in the account an "I.O.U.", with or without stipulation of interest.

It does not by any means follow, however, that the "impoundment" of the disputed off shore mineral revenues was wholly without practical effect. The establishment of a special account was more than a record keeping device. For budgetary purposes, the disputed off shore receipts were not treated as revenues. And, importantly, the recognition of a contingent liability corresponding to the cash deposited enabled the United States to make prompt payment to the State without any special congressional authorization or appropriation. In sum, the impoundment served its intended purpose.

We now turn to the only real question: whether the account established to "impound" the disputed revenues should have provided for the earning of interest.

C. The Obligation to Invest or Pay Interest

We have already noted that, in the circumstances, it can make no difference whether the Treasury formally "purchased" its own short-term securities to be held in the special "tidelands" account, or simply credited that account with interest at a corresponding rate. The question is whether the Treasury was required to do either. In our view, the answer is plainly "No."

1. The dispositive fact is that the Interim Agreement does not provide for the investment of the impounded funds or the payment of interest on distribution. There is not a word about investment or interest in the entire document. Indeed, the provision of the Agreement

relating to disbursement of the accumulated revenues upon resolution of the boundary dispute strongly suggests the opposite: the "funds * * * shall be taken from the separate and impounded fund in the Treasury * * *" and paid to the State (para. 9(b)). There is no mention of "principal and interest," as one would expect if the fund were to be earning interest.

2. It will not do to suppose that the duty to invest or pay interest was not spelled out because it "goes without saying" that a custodian of monies in the position of the United States has such an obligation. There is no such general rule of law—certainly not as applied to the United States. The term "impoundment" simply cannot carry so much weight. At least in the case of the United States, an express stipulation to invest or pay interest is necessary. *Smyth* v. *United States*, 302 U.S. 329, 353 (1937); *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947). See, also, 28 U.S.C. 2516(a).

3. Moreover, in the present instance, the omission of any provision for interest was conscious. When the Interim Agreement was signed, almost $60 million in disputed revenues had already accumulated and the potential importance of interest was obvious. As two of Louisiana's negotiators candidly testified, they did not insist on an interest clause only because they knew the United States would not agree. Tr. 70, 95, 98, 99, 102, 103, 163.

It is now suggested that Louisiana was willing to pass the matter in silence because the Agreement was expected to be short-lived. We note, however, that the Agreement itself had no term and that it expressly provided for operations after a year has elapsed. See

para. 13. Moreover, given the dilatory maneuvers the State had already initiated,[3] one may doubt if it anticipated a quick resolution of the boundary question. But, at all events, the remedy for failure to stipulate for interest was express amendment of the Agreement, not a unilateral retroactive rewriting twenty years later.

4. Finally, there can be no claim that Louisiana was unaware that the funds were not invested or that, regardless of investment, the United States did not hold itself accountable to pay interest. As the Agreement required (para. 8), the State received regular monthly reports of the amounts credited to the "tidelands" account, which, on their face, reflected that interest was not being earned. And, among other indications that the State was fully aware of the actual handling of the impounded funds are the several communications during 1960 from the State Attorney General, Louisiana's Senators and Congressmen and the State Legislature, all requesting the Treasury to deposit some of the "tidelands" monies in Louisiana banks—presumably so that they might enjoy free use of the funds. See. La. Exh. 1-LP1 Nos. 25, 26, 28 and 29. But Louisiana's knowledge and acquiescence in the status quo is most clearly revealed by its acceptance, without the mildest objection to the failure to include interest, of some $34 million of accumulated impounded revenues, pursuant to this Court's decree of December 13, 1965. See 382 U.S. 288, 293.

To be sure, in mid-1967, the Louisiana Legislature asked that the impounded funds be invested. But this was a request for a *change* of status. If the State had believed the United States was violating the Agreement by failing to invest the revenues, it would not have

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[3]See our opening Memorandum, at 6 n.4, 13, 15-17.

accepted the government's answer, but, instead, would have applied to this Court for relief. In fact, the State made no further attempt to secure investment of the funds, by amendment of the Agreement or otherwise.

In sum, the obligations of the United States in this matter were defined by the Interim Agreement and cannot be extended beyond the requirements there set out. The bargain was made; it was never changed; and both parties remain bound by it. Any benefits accuring to the United States from administration of the fund were no more than collateral consequences, foreseen by the State, and accepted as one aspect of the considerations that produced the Interim Agreement. There being no liability for interest under the Agreement, none can arise outside of it.

CONCLUSION

For the foregoing reasons, the exceptions of the State of Louisiana to the Special Master's Report should be overruled.

Respectfully submitted.

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